# THE GENERAL STATUTES OF NORTH CAROLINA

## ANNOTATED

## 1994 CUMULATIVE SUPPLEMENT

# Volume 9

## Chapters 53 through 57C

*Prepared under the Supervision of*

The Department of Justice
of the State of North Carolina

BY

The Editorial Staff of the Publishers

*Under the Direction of*

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and F. J. Payne

Annotated through 443 S.E.2d 468. For complete scope of annotations, see scope of volume page.

**Place Behind Supplement Tab in Binder Volume. This Supersedes Previous Supplement, Which May Be Retained for Reference Purposes.**

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# Preface

This Cumulative Supplement to Volume 9 contains the general laws of a permanent nature enacted by the General Assembly through the 1993 (Reg. Sess., 1994) Session, which are within the scope of such volume, and brings to date the annotations included therein.

Amendments are inserted under the same section numbers appearing in the General Statutes, and new laws appear under the proper chapter headings.

Chapter analyses show all affected sections, except sections for which catchlines are carried for the purposes of notes only. An index to all statutes codified herein will appear in the Replacement Index Volumes.

A majority of the Session Laws are made effective upon ratification, but a few provide for stated effective dates. If the Session Law makes no provision for an effective date, the law becomes effective under G.S. 120-20 "from and after 30 days after the adjournment of the session" in which passed.

Beginning with the opinions issued by the North Carolina Attorney General on July 1, 1969, any opinion which construes a specific statute is cited as an annotation to that statute. For a copy of an opinion or of its headnotes write the Attorney General, P. O. Box 629, Raleigh, N.C. 27602.

The members of the North Carolina Bar are requested to communicate any defects they may find in the General Statutes or in this Cumulative Supplement and any suggestions they may have for improving the General Statutes, to the Department of Justice of the State of North Carolina, or to The Michie Company, Law Publishers, Charlottesville, Virginia.

# User's Guide

In order to assist both the legal profession and the layperson in obtaining the maximum benefit from the North Carolina General Statutes, a User's Guide has been included in Volume 1. This guide contains comments and information on the many features found within the General Statutes intended to increase the usefulness of this set of laws to the user. See Volume 1 for the complete User's Guide.

# Scope of Volume

**Statutes:**

Permanent portions of the General Laws enacted by the General Assembly through the 1993 (Reg. Sess., 1994) Session affecting Chapters 53 through 57C of the General Statutes.

**Annotations:**

Sources of the annotations to the General Statutes appearing in this volume are:

North Carolina Reports through Volume 336, p. 77.
North Carolina Court of Appeals Reports through Volume 114, p. 505.
South Eastern Reporter 2nd Series through Volume 443, p. 468.
Federal Reporter 3rd Series through Volume 21, p. 1127.
Federal Supplement through Volume 848, p. 212.
Federal Rules Decisions through Volume 154, p. 535.
Bankruptcy Reports through Volume 166, p. 498.
Supreme Court Reporter through Volume 114, p. 1877.
North Carolina Law Review through Volume 72, p. 1128.
Wake Forest Law Review through Volume 29, p. 646.
Campbell Law Review through Volume 16, p. 145.
Duke Law Journal through Volume 43, p. 1348.
North Carolina Central Law Journal through Volume 20, p. 229.
Opinions of the Attorney General.

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# The General Statutes of North Carolina
# 1994 Cumulative Supplement

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## VOLUME 9

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## Chapter 53.

**Editor's Note.** — The legislation and annotations affecting Chapter 53 have been included in a recently published replacement chapter.

# Chapter 53A.

# Business Development Corporations and North Carolina Capital Resource Corporations.

**Article 2.**

**North Carolina Capital Resource Corporations.**

Sec.
53A-20 through 53A-34. [Expired.]

**Article 3.**

**North Carolina Enterprise Corporations.**

Sec.
53A-46. Tax credit.

## ARTICLE 2.

## *North Carolina Capital Resource Corporations.*

### §§ 53A-20 through 53A-34: Expired.

**Editor's Note.** — Section 53A-34 of this Article provided, inter alia, that if no corporation was organized pursuant to this Article at the expiration of three years after July 1, 1987, the Article would expire on that date. According to information from the Secretary of State's office and the Commissioner of Banks, no corporation was formed under this Article as of July 1, 1990; therefore, the Revisor of Statutes has directed that this Article be set out as expired, effective July 1, 1990.

For the text of former §§ 53A-20 through 53A-34, see the main volume.

## ARTICLE 3.

## *North Carolina Enterprise Corporations.*

### § 53A-46. Tax credit.

A person or corporation that invests in the equity securities of a North Carolina Enterprise Corporation or in the equity securities of a limited partnership in which a North Carolina Enterprise Corporation is the only general partner is entitled to a tax credit as provided in G.S. 105-163.010 through G.S. 105-163.014. (1987 (Reg. Sess., 1988), c. 882, s. 1; 1989 (Reg. Sess., 1990), c. 848, s. 1.)

**Effect of Amendments.** — The 1989 (Reg. Sess., 1990) amendment, effective for taxable years beginning on or after January 1, 1990, substituted the language beginning "or in the equity" and ending "general partner is" for "may be."

# Chapter 53B.

# Financial Privacy Act.

## § 53B-2. Definitions.

### OPINIONS OF ATTORNEY GENERAL

**"Customer."** — A person whose name has been used without his knowledge or consent in opening an account for unlawful purposes, who has transacted no business through the account, and who has not used the services of the financial institution in connection with the account is not a "customer" of the institution within the meaning of this chapter. See opinion of Attorney General to Ms. Mary Claire McNaught, Public Safety Attorney, 59 N.C.A.G. 4 (1989).

## § 53B-3. Public policy.

### OPINIONS OF ATTORNEY GENERAL

***Editor's Note.** — The opinion of the Attorney General cited under this section in the main volume may be found at 59 N.C.A.G. 4 (1989).*

**There are no exceptions to the public policy expressed in this section.** Any agency or institution which gains or provides access to records except in conformity with this Chapter is subject to the substantial penalties provided for in § 53B-10. See opinion of Attorney General to Ms. Mary Claire McNaught, Public Safety Attorney, 59 N.C.A.G. 4 (1989).

**The fact that a financial institution is the victim of a crime or sustains a loss** through an account held in a false or fictitious name by one of its customers does not waive the provisions of this Chapter. The Chapter provides the exclusive means by which a financial institution may give a government authority access to a customer's financial records or by which a government authority may obtain access to such records. See opinion of Attorney General to Ms. Mary Claire McNaught, Public Safety Attorney, 59 N.C.A.G. 4 (1989).

## § 53B-4. Access to financial records.

### OPINIONS OF ATTORNEY GENERAL

***Editor's Note.** — The opinion of the Attorney General cited under this section in the main volume may be found at 59 N.C.A.G. 4 (1989).*

**The notice specified in § 53B-5(3) must be served** pursuant to the provisions of that section or of § 53B-6 on every customer whose financial records are sought to be accessed by an agency or department of the State or any of its political subdivisions through a court order or administrative or judicial subpoena authorized under subdivision (11) of this section. This Chapter creates no exception for a customer who has opened an account in a false or fictitious name. See opinion of Attorney General to Ms. Mary Claire McNaught, Public Safety Attorney, 59 N.C.A.G. 4 (1989).

**The fact that a financial institution is the victim of a crime or sustains a loss** through an account held in a false or fictitious name by one of its customers does not waive the provisions of this Chapter. The Chapter provides the exclusive means by which a financial institution may give a government authority access to a customer's financial records or by which a government authority may obtain access to such records. See opinion of Attorney General to Ms. Mary Claire McNaught, Public Safety Attorney, 59 N.C.A.G. 4 (1989).

## § 53B-5. Service on customer certification.

### OPINIONS OF ATTORNEY GENERAL

***Editor's Note.** — The opinion of the Attorney General cited under this section in the main volume may be found at 59 N.C.A.G. 4 (1989).*

**The notice specified in subdivision (3) of this section must be served** pursuant to the provisions thereof or of § 53B-6 on every customer whose financial records are sought to be accessed by an agency or department of the State or any of its political subdivisions through a court order or administrative or judicial subpoena authorized under § 53B-4(11). This Chapter creates no exception for a customer who has opened an account in a false or fictitious name. See opinion of Attorney General to Ms. Mary Claire McNaught, Public Safety Attorney, 59 N.C.A.G. 4 (1989).

**The fact that a financial institution is the victim of a crime or sustains a loss** through an account held in a false or fictitious name by one of its customers does not waive the provisions of this Chapter. The Chapter provides the exclusive means by which a financial institution may give a government authority access to a customer's financial records or by which a government authority may obtain access to such records. See opinion of Attorney General to Ms. Mary Claire McNaught, Public Safety Attorney, 59 N.C.A.G. 4 (1989).

## § 53B-6. Delayed notice.

### OPINIONS OF ATTORNEY GENERAL

**The notice specified in § 53B-5(3) must be served** pursuant to the provisions of that section or of this section on every customer whose financial records are sought to be accessed by an agency or department of the State or any of its political subdivisions through a court order or administrative or judicial subpoena authorized under § 53B-4(11). This Chapter creates no exception for a customer who has opened an account in a false or fictitious name. See opinion of Attorney General to Ms. Mary Claire McNaught, Public Safety Attorney, 59 N.C.A.G. 4 (1989).

**The fact that a financial institution is the victim of a crime or sustains a loss** through an account held in a false or fictitious name by one of its customers does not waive the provisions of this Chapter. The Chapter provides the exclusive means by which a financial institution may give a government authority access to a customer's financial records or by which a government authority may obtain access to such records. See opinion of Attorney General to Ms. Mary Claire McNaught, Public Safety Attorney, 59 N.C.A.G. 4 (1989).

## § 53B-8. Disclosure of financial records.

### OPINIONS OF ATTORNEY GENERAL

**The fact that a financial institution is the victim of a crime or sustains a loss** through an account held in a false or fictitious name by one of its customers does not waive the provisions of this Chapter. The Chapter provides the exclusive means by which a financial institution may give a government authority access to a customer's financial records or by which a government authority may obtain access to such records. See opinion of Attorney General to Ms. Mary Claire McNaught, Public Safety Attorney, 59 N.C.A.G. 4 (1989).

## § 53B-10. Penalty.

### OPINIONS OF ATTORNEY GENERAL

*Editor's Note. — The opinion of the Attorney General cited under this section in the main volume may be found at 59 N.C.A.G. 4 (1989).*

**There are no exceptions to the public policy expressed in § 53B-3.** Any agency or institution which gains or provides access to records except in conformity with this Chapter is subject to the substantial penalties provided for in this section. See opinion of Attorney General to Ms. Mary Claire McNaught, Public Safety Attorney, 59 N.C.A.G. 4 (1989).

**The fact that a financial institution is the victim of a crime or sustains a loss** through an account held in a false or fictitious name by one of its customers does not waive the provisions of this Chapter. The Chapter provides the exclusive means by which a financial institution may give a government authority access to a customer's financial records or by which a government authority may obtain access to such records. See opinion of Attorney General to Ms. Mary Claire McNaught, Public Safety Attorney, 59 N.C.A.G. 4 (1989).

# Chapter 54.

# Cooperative Organizations.

## SUBCHAPTER II. LAND AND LOAN ASSOCIATIONS.

### Article 8.

### Organization and Powers.

Sec.

54-67. Redemption of bonds.

## SUBCHAPTER III. CREDIT UNIONS.

### Article 14A.

### Formation of Credit Union.

54-109.5. (Effective October 1, 1994 — See editor's note) Use of name exclusive.

54-109.7. Conducting business outside this State.

54-109.8, 54-109.9. [Reserved.]

### Article 14B.

### Supervision and Regulation.

54-109.10. Creation and supervision of Division.

54-109.11. Duties of Administrator.

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### Powers of Credit Union.

54-109.21. General powers.

### Article 14F.

### Savings Accounts.

54-109.57. Trusts accounts.

54-109.58. Joint accounts.

54-109.63. Personal agency accounts.

### Article 14-I.

### Investments.

54-109.82. Investment of funds.

### Article 14M.

### Confidential Information.

Sec.

54-109.105. (See editor's note for date change) What information deemed confidential; disclosure; certain information deemed public; exchange of information.

### Article 14N.

### Foreign Credit Unions.

54-109.106. Foreign Credit Unions.

## SUBCHAPTER V. MARKETING ASSOCIATIONS.

### Article 19.

### Purpose and Organization.

54-139. Foreign cooperative corporations; limitation on use of word "cooperative."

54-142. Application of North Carolina Business Corporation Act to cooperative associations with capital stock.

### Article 21.

### Powers, Duties, and Liabilities.

54-157. (Effective October 1, 1994 — See editor's note) Breach of marketing contract of cooperative association; spreading false reports about the finances or management thereof; misdemeanor.

# SUBCHAPTER II. LAND AND LOAN ASSOCIATIONS.

## ARTICLE 8.

## *Organization and Powers.*

### § 54-67. Redemption of bonds.

(a) Notice of redemption of bonds may on no account be given on the part of the holder thereof, but may be given by the association only for the purpose of effecting redemption in accordance with the conditions of the bonds and as provided by law and the bylaws.

(b) If the land mortgage association shall elect to redeem any bond prior to maturity, six months' notice of redemption shall be given and shall be effected by personal service upon the owner and holder of the bond, by notice mailed to his address as registered or by advertising the same three times in a newspaper selected by the State Treasurer.

(c) The numbers of the bonds of which notice of redemption is to be given shall be determined by lot, to be drawn by the president or the vice-president at a meeting of the trustees. (1925, c. 223, s. 19; 1993, c. 553, s. 15.)

**Effect of Amendments.** — The 1993 amendment, effective July 24, 1993, in subsection (a) substituted "effecting" for "affecting".

# SUBCHAPTER III. CREDIT UNIONS.

## ARTICLE 14A.

## *Formation of Credit Union.*

### § 54-109.5. (Effective October 1, 1994 — See editor's note) Use of name exclusive.

With the exception of a credit union organized under the provisions of Articles 14A to 14L of this Chapter or of any other credit union act, or an association of credit unions or a recognized chapter thereof, any person, corporation, copartnership or association using a name or title containing the words "credit union" or any derivation thereof or representing themselves in their advertising or otherwise as conducting business as a credit union shall be guilty of a Class 1 misdemeanor, and may be permanently enjoined from using such words in its name. (1915, c. 115, s. 4; C.S., s. 5214; 1925, c. 73, s. 3; 1935, c. 87; 1941, c. 236; 1975, c. 538, s. 1; 1993, c. 539, s. 428; 1994, Ex. Sess., c. 24, s. 14(c).)

**Editor's Note.** — Session Laws 1993, c. 539, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

**Effect of Amendments.** — The 1993 amendment, effective October 1, 1994, and applicable to offenses occurring on or after that date, substituted "Class 1 misdemeanor" for "misdemeanor punishable by fine of not more than five hundred dollars ($500.00) or imprisoned not more than one year, or both".

## § 54-109.7. Conducting business outside this State.

A credit union incorporated under this Subchapter may conduct business outside of this State in any state where it is permitted to conduct business as a credit union. (1991, c. 651, s. 1.)

**Editor's Note.** — Session Laws 1991, c. 651, s. 5 made this section effective October 1, 1991.

**§§ 54-109.8, 54-109.9:** Reserved for future codification purposes.

## ARTICLE 14B.

## *Supervision and Regulation.*

## § 54-109.10. Creation and supervision of Division.

There shall be established in the North Carolina Department of Commerce a Credit Union Division which shall be under the supervision of the Administrator of Credit Unions appointed by the Secretary of Commerce. The Credit Union Division and the Administrator of Credit Unions shall be under the general direction and supervision of the Secretary of Commerce, and there shall be such assistants to the Administrator of Credit Unions as may be necessary and the salaries of the Administrator and assistants shall be fixed by the State Personnel Council. (1915, c. 115, s. 1; C.S., s. 5208; 1925, c. 73, s. 4; 1935, c. 87; 1965, c. 956, s. 1; 1971, c. 864, s. 17; 1975, c. 538, s. 1; 1989, c. 751, s. 9(c); 1991 (Reg. Sess., 1992), c. 959, s. 3.)

**Effect of Amendments.** — The 1991 (Reg. Sess., 1992) amendment, effective January 1, 1993, substituted "Commerce" for "Economic and Community Development" throughout the section, and inserted "the" preceding "Administrator" in the first sentence.

## § 54-109.11. Duties of Administrator.

The duties of the Administrator of Credit Unions shall be as follows:

(1) To organize and conduct in the State Department of Commerce, a bureau of information in regard to cooperative associations and rural and industrial credits.

(2) Upon request, to furnish, without cost, such printed information and blank forms as, in his discretion, may be necessary for the formation and establishment of any local credit union in the State.

(3) To maintain an educational campaign in the State looking to the promotion and organization of credit unions. Upon

the written request of 12 bona fide residents of any particular locality in this State expressing a desire to form a local credit union at or in such locality, the Administrator of Credit Unions, or one of his assistants, shall proceed as promptly as may be convenient to such locality and make an investigation in order that the Administrator may determine whether or not a local credit union should be established according to the standards set forth and provided in this Article. The Administrator shall notify the applicants of his decision within 30 days after receipt of the written request. Before refusing the establishment of a credit union, the Administrator shall afford the applicants an opportunity to be heard therewith in person or by counsel and at least 60 days prior to the date set for a hearing on any such matter shall notify in writing the applicants of the date of said hearing and assign therein the grounds for the action contemplated to be taken and as to which inquiry shall be made on the date of such hearing. The determination of the Administrator shall be subject to judicial review in all respects according to the provisions and procedures set forth in Chapter 150B of the General Statutes of North Carolina, as amended.

(4) To examine at least once a year, and oftener if such examination be deemed necessary by the Administrator or his assistant, the credit unions formed under this Article. A report of such examination shall be filed with the State Department of Commerce, and a copy mailed to the credit union at its proper address.

(5) The Administrator of Credit Unions is authorized, empowered, and directed to fix the amount of a blanket surety bond which shall be required of each credit union official, committee member and employee, irrespective of whether such official, committee member and employee receives, pays or has custody of money or other personal property owned by a credit union or in the custody or control of the credit union as collateral or otherwise. The surety on the bond shall be a surety company authorized to do business in North Carolina. Any such bond or bonds shall be in a form approved by the Administrator of Credit Unions with a view to providing surety coverage to the credit union with reference to loss by reason of acts of fraud or dishonesty including forgery, theft, embezzlement, wrongful abstraction or misapplication on the part of the person, directly or through connivance with others, and such other surety coverages as the Administrator of Credit Unions may determine to be reasonably appropriate or as elsewhere required by the Chapter. Any such bond or bonds shall be in an amount in relation to the money or other personal property involved or in relation to the assets of the credit union as the Administrator may from time to time prescribe by regulation for the purpose of requiring reasonable coverage. The Administrator may also approve the use of a form of excess coverage bond whereby a credit union may obtain an amount of coverage in excess of the basic surety coverage. No agreement, compromise or settlement of any claim or claims filed by a credit union with

any surety or any surety company for less than the full amount of said claim or claims shall be entered into or made by the board of directors of any credit union unless and until the said claim or claims shall have been submitted to the Administrator of Credit Unions and his advice thereon given or transmitted to the board of directors of said credit union. The following schedule shall be deemed as the minimum fidelity and faithful performance bond requirements only:

| *Assets* | | *Minimum Coverage* |
|---|---|---|
| $ 0,000 to | $ 5,000 | $ 1,000 |
| 5,001 to | 10,000 | 2,000 |
| 10,001 to | 20,000 | 4,000 |
| 20,001 to | 30,000 | 6,000 |
| 30,001 to | 40,000 | 8,000 |
| 40,001 to | 50,000 | 10,000 |
| 50,001 to | 75,000 | 15,000 |
| 75,001 to | 100,000 | 20,000 |
| 100,001 to | 200,000 | 30,000 |
| 200,001 to | 300,000 | 40,000 |
| 300,001 to | 400,000 | 50,000 |
| 400,001 to | 500,000 | 70,000 |
| 500,001 to | 750,000 | 85,000 |
| 750,001 to | 1,000,000 | 100,000 |
| 1,000,001 to | 50,000,000 | $100,000 plus $50,000 for each million or fraction thereof of assets over $1,000,000 |
| $50,000,001 to | $150,000,000 | $2,500,000 plus $25,000 for each million or fraction thereof of assets over $50,000,000 |
| Over $150,000,000 | | $5,000,000 |

It shall be the duty of the board of directors of each credit union to provide proper protection to meet any circumstances by obtaining adequate bond (an insurance) coverage in excess of the above minimum schedule. The treasurer and all other persons handling credit union funds or records before entering upon his or their duties shall give a proper bond with good and sufficient surety, in an amount and character to be determined by the board in compliance with regulations conditioned upon the faithful performance of his or their trust.

The Administrator may require additional coverage for any credit union when, in his opinion, the surety bonds in force are insufficient to provide adequate surety coverage, and it shall be the duty of the board of directors of any credit union to obtain such additional coverage within 60 days after the date of written notice by the Administrator to such board of directors. For good cause shown, the Administrator may extend the time to obtain additional coverage. (1915, c. 115, s. 1; C.S., s. 5209; 1925, c. 73, ss. 2, 3, 5, 6; 1935, c. 87; 1957, c. 989, s. 1; 1965, c. 956, ss. 1-3; 1971, c. 864, s. 17; 1973, c. 199, ss. 1-3; c. 1331, s. 3; 1975, c. 538, s. 1; 1977, c. 559, s. 1; 1987, c. 827, s. 1; 1989, c. 751, s. 7(2); 1991 (Reg. Sess., 1992), c. 959, ss. 4, 4.1.)

**Effect of Amendments.** —

The 1991 (Reg. Sess., 1992) amendment, effective January 1, 1993, substituted "Commerce" for "Economic and Community Development" in subdivision (1) and in the second sentence of subdivision (4).

### OPINIONS OF ATTORNEY GENERAL

***Editor's Note.*** — *The opinion of the Attorney General cited under this section in the main volume may be found at 59 N.C.A.G. 8 (1989).*

**The language of subdivision (5) of this section and of § 54-109.44(2) relating to blanket surety bonds is mandatory** and extends to all state-chartered credit union officers, employees, agents, and others in a position of trust. See opinion of Attorney General to Mr. Stanley W. Brown, Jr., Deputy Administrator, Credit Union Division, Department of Commerce, 59 N.C.A.G. 8 (1989).

**And Conflicting Administrative Rule Was Void.** — To the extent that an administrative rule purported to permit an individual's bond to be substituted for the blanket bond or to permit an individual's bond to cover persons other than those specified in subdivision (5) of this section, it was in conflict with controlling law and was void. See opinion of Attorney General to Mr. Stanley W. Brown, Jr., Deputy Administrator, Credit Union Division, Department of Commerce, 59 N.C.A.G. 8 (1989).

**Discretion of Administrator and Board.** — The provision of subdivision (5) of this section requiring a surety bond of the "treasurer and all other persons handling credit union funds or records" means that the board of directors may require, consistent with administrative rules promulgated by the administrator, an additional surety bond for those having actual possession of or control over credit union funds or financial records. Since the administrator has broad discretion and authority under § 54-109.12 to prescribe rules "relating to financial records, business practices and the conduct and management of credit unions," the administrator can promulgate reasonable guidelines for boards of directors to follow in determining the "amount and character" of the bond to be required. However, it is not within the discretion of a board of directors or the administrator to determine who shall be covered by the bond, other than to identify "persons handling credit union funds or records." See opinion of Attorney General to Mr. Stanley W. Brown, Jr., Deputy Administrator, Credit Union Division, Department of Commerce, 59 N.C.A.G. 8 (1989).

The additional bond provided for in subdivision (5) of this section, must cover "the treasurer and all other persons handling credit union funds or records." Nothing in the statutes permits the chief financial officer or the chief executive officer of a state-chartered credit union to be substituted for the persons specified. See opinion of Attorney General to Mr. Stanley W. Brown, Jr., Deputy Administrator, Credit Union Division, Department of Commerce, 59 N.C.A.G. 8 (1989).

## § 54-109.12. Corporations organized hereunder subject to Administrator of Credit Unions; rules and regulations.

### OPINIONS OF ATTORNEY GENERAL

**The provision of § 54-109.11(5) requiring a surety bond** of the "treasurer and all other persons handling credit union funds or records" means that the board of directors may require, consistent with administrative rules promulgated by the administrator, an additional surety bond for those having actual possession of or control over credit union funds or financial records. Since the administrator has broad discretion and authority under this section to prescribe rules "relating to financial records, business practices and the conduct and management of credit unions," the administrator can promulgate reasonable guidelines for boards of directors to follow in determining the "amount and character" of the bond to be required. However, it is not within the discretion of a board of directors or the administrator to determine who shall be covered by the bond, other than to identify "persons handling credit union funds or records." See opinion of Attorney General to Mr. Stanley W. Brown, Jr., Deputy Administrator, Credit Union Division, Department of Commerce, 59 N.C.A.G. 8 (1989).

## § 54-109.15. Reports.

(a) Credit unions organized under Articles 14A to 14L of this Chapter shall, in January and in July of each year, make a report of condition to the Administrator of Credit Unions on forms supplied for that purpose. Additional reports may be required.

(b) Any credit union that neglects to make semiannual reports as provided in subsection (a) of this section, or any of the other reports required by the Administrator of Credit Unions at the time fixed by the Administrator, shall pay a late penalty to the Administrator of Credit Unions of seventy-five dollars ($75.00) for each day the neglect continues. The Administrator of Credit Unions may revoke the certificate of incorporation and take possession of the assets and business of any credit union failing to pay a penalty imposed under this section after serving notice of at least 15 days upon the credit union of the proposed action. Penalties collected under this section shall be credited to the special account established under G.S. 54-109.14. (1915, c. 115, s. 7; C.S., ss. 5238, 5240; 1925, c. 73, ss. 3, 7, 8; 1935, c. 87; 1941, c. 235; 1955, c. 1135, ss. 3, 4; 1957, c. 989, ss. 7, 8; 1965, c. 956, ss. 1, 23, 24; 1969, c. 69, s. 6; 1971, c. 864, s. 17; 1973, c. 199, s. 12; 1975, c. 538, s. 1; 1991, c. 651, s. 2.)

**Effect of Amendments.** — The 1991 amendment, effective October 1, 1991, deleted "by him" preceding "for that purpose" in subsection (a); and in subsection (b), in the present first sentence, substituted "credit union that," for "such corporation which," substituted "pay a late penalty" for "forfeit," substituted "of seventy-five dollars ($75.00)" for "five dollars ($5.00)" divided the former first sentence into two sentences by substituting "the neglect continues. The Administrator" for "such neglect continues; and, furthermore, the Administrator", in the second sentence, substituted "may revoke" for "shall have authority, in his discretion, to revoke", substituted "credit union" for "corporation", substituted "a penalty imposed under" for "the fees required in", substituted "the credit union of the proposed action" for "such corporation of his intention so to do", and added the last sentence.

## ARTICLE 14C.

### *Powers of Credit Union.*

## § 54-109.21. General powers.

A credit union may:

(1) Make contracts;

(2) Sue and be sued;

(3) Adopt and use a common seal and alter the seal;

(4) Acquire, lease, hold and dispose of property, either in whole or in part, necessary or incidental to its operations;

(5) At the discretion of the board of directors, require the payment of an entrance fee or annual membership fee, or both, of any person admitted to membership;

(6) Receive savings from its members in the form of shares, deposits, or special-purpose thrift accounts;

(7) Lend its funds to its members as provided in Articles 14A to 14L of this Chapter;

(8) Borrow from any source in accordance with policy established by the board of directors;

(9) Discount and sell any eligible obligations, subject to rules adopted by the Administrator;

(10) Sell all or substantially all of its assets or purchase all or substantially all of the assets of another financial institution, subject to the approval of the Administrator of Credit Unions;

(11) Invest surplus funds as provided in Articles 14A to 14L of this Chapter;

(12) Make deposits in legally chartered banks, savings institutions, trust companies and central-type credit union organizations;

(13) Assess charges to members in accordance with the bylaws for failure to meet properly their obligations to the credit union;

(14) Hold membership in other credit unions organized under Articles 14A to 14L of this Chapter or other acts, and in other associations and organizations composed of credit unions;

(15) Declare dividends; pay interest on deposits and pay interest refunds to borrowers as provided in Articles 14A to 14L of this Chapter;

(16) Sell travelers checks and money orders and charge a reasonable fee for such services, provided the travelers checks are payable at institutions other than a credit union;

(17) Perform tasks and missions requested by the federal government or this State or any agency or political subdivision thereof, when approved by the board of directors and not inconsistent with Articles 14A to 14L of this Chapter;

(18) Act as fiscal agent for and receive deposits from the federal government, this State, or any agency or political subdivision thereof;

(19) Contribute to, support, or participate in any nonprofit service facility whose services will benefit the credit union or its membership subject to rules adopted by the Administrator;

(20) Make donations or contributions to any civic, charitable or community organization as authorized by the board of directors, subject to such regulations as are prescribed by the Administrator;

(21) Act as a custodian of qualified pension funds if permitted by federal law;

(22) Purchase or make available insurance for its directors, officers, agents, employees, and members; and

(23) Facilitate its members' purchase of goods and services in a manner which promotes the purposes of the credit union.

(24) The board of directors may expel from the corporation any member who has not carried out the engagement the member made with the corporation, has been convicted of a felony or crime involving moral turpitude, or neglects or refuses to comply with the provisions of this Article or of

the bylaws. The Board may, after notice and hearing as provided in this subdivision, expel from the corporation any member who because of the member's intemperance disrupts the activities of the credit union or who because of the member's habitual neglect of financial obligations reflects discredit upon the credit union. No member shall be expelled until informed in writing of the charges made and given an opportunity, after reasonable notice, to be heard.

(25) Engage in activity permitted under this subdivision. Notwithstanding any other provision of this Chapter, the Administrator of Credit Unions, subject to the advice and consent of the Credit Union Commission, and upon a finding that action is necessary to preserve and protect the welfare of credit unions and to promote the general economy of the State, may adopt rules allowing State-chartered credit unions to engage in any activity in which they could engage if they were federally chartered credit unions.

(26) Subject to rules adopted by the Administrator, act as trustee or custodian, and receive reasonable compensation for so acting, under any written trust instrument or custodial agreement created or organized and forming a part of a deferred compensation plan for its members or groups or organizations of its members, provided the funds of the plans are invested in savings or deposits of the credit union. All funds held may be commingled for the purpose of investment, but individual records shall be kept by the credit union for each participant and shall show in proper detail all transactions engaged in under authority of this subdivision.

A member may withdraw from a credit union by filing a written notice of intent to withdraw.

The amounts paid in on shares or deposits by an expelled or withdrawing member, with any dividends credited to the shares and any interest accrued on the deposits to the date of expulsion or withdrawal shall be paid to the member, but in the order of expulsion or withdrawal, and only as funds therefor become available, after deducting any amounts due to the credit union by the member. The member shall have no other or further right in the credit union or to any of its benefits, but the expulsion or withdrawal shall not operate to relieve the member from any remaining liability to the credit union. (1915, c. 115, ss. 5, 16, 17, 23; C.S., ss. 5216-5218, 5231; 1925, c. 73, ss. 3, 10; 1935, c. 87; 1965, c. 956, s. 8; 1975, c. 538, s. 1; 1977, c. 559, s. 5; 1983, c. 568, s. 2; 1991, c. 651, s. 3.)

**Effect of Amendments.** — The 1991 amendment, effective October 1, 1991, substituted "alter the seal" for "alter same" in subdivision (3); substituted "provided in Articles 14A to 14L of this Chapter" for "hereinafter provided" in subdivision (7); substituted "adopted" for "and regulations prescribed" in subdivision (9); substituted "savings institutions" for "savings banks, savings and loan associations" in subdivision (12); substituted "travelers checks" for "instruments" in subdivision (16); in subdivision (17), deleted "such" preceding "tasks" and deleted "as are" preceding "requested"; substituted "rules adopted" for "such regulations as are prescribed" in subdivision (19); rewrote subdivision (24); substituted "subdivision" for "subsection" in the first sentence of subdivision (25); in subdivision (26), in the first sentence, substituted "adopted" for "and regulations prescribed," deleted "may" preceding "receive", substituted "organizations" for "organization", and substituted "the plans" for "such plans", and in the second sentence, substituted "the purpose" for "appropriate purpose" and substituted "subdivision" for "section"; substituted "intent" for "his intention" in the first paragraph following subdivision (26); and in the last paragraph, in the first sentence, substituted "the shares" for "his shares", substituted "the deposits" for "his deposits", substituted "the member" for "such member", and substituted "credit union by the" for "corporation by such", and in the last sentence substituted "the expulsion" for "such expulsion" and substituted "credit union" for "corporation."

## ARTICLE 14E.

## *Direction of Affairs.*

### § 54-109.44. Duties of directors.

OPINIONS OF ATTORNEY GENERAL

*Editor's Note. — The opinion of the Attorney General cited under this section in the main volume may be found at 59 N.C.A.G. 8 (1989).*

**The language of §§ 54-109.11(5) and subdivision (2) of this section relating to blanket surety bonds is mandatory** and extends to all state-chartered credit union officers, employees, agents, and others in a position of trust. See opinion of Attorney General to Mr. Stanley W. Brown, Jr., Deputy Administrator, Credit Union Division, Department of Commerce, 59 N.C.A.G. 8 (1989).

## ARTICLE 14F.

## *Savings Accounts.*

### § 54-109.57. Trusts accounts.

(a) Shares may be issued to and deposits received from any person establishing an account who shall execute a written agreement with the credit union containing a statement that it is executed pursuant to the provisions of this subsection and providing for the account to be held in the name of such person as trustee for not more than one person designated as beneficiary, the account and any balance thereof shall be held as a trust account, with the following incidents:

(1) The trustee during the trustee's lifetime may change the designated beneficiary by a written direction to the credit union.

(2) The trustee may withdraw funds by writing checks or otherwise, as set forth in the account contract, and receive payment in cash or check payable to the trustee's personal order. Such payment or withdrawal shall constitute a revocation of the trust agreement as to the amount withdrawn.

(3) If the beneficiary is living and of legal age at the death of the trustee, the beneficiary shall be the holder of the account, and payment by the credit union to the holder shall be a total discharge of the credit union's obligation as to the amount paid.

(4) If the beneficiary predeceases the trustee, the account shall become an individual account of the trustee and shall have the legal incidents of an individual account.

(5) If the named beneficiary is not of legal age at the death of the trustee, the credit union shall transfer the funds in the account to the general guardian or guardian of the estate, if any, of the minor beneficiary. If no guardian of the minor beneficiary has been appointed, the credit union shall hold the funds in a similar interest bearing account in the name of the minor until the minor reaches the age of majority or until a duly appointed guardian withdraws the funds.

(6) Funds in a trust account established pursuant to this subsection shall belong to the beneficiary upon the death of the trustee and the funds shall be subject only to the personal representative's right of collection as set forth in G.S. 28A-15-10(a)(1). Payment by the credit union of funds in the trust account to the beneficiary shall terminate the personal representative's authority under G.S. 28A-15-10(a)(1) to collect against the credit union for the funds so paid, but the personal representative's authority to collect such funds from the beneficiary is not terminated.

The person establishing an account under this subsection shall sign a statement containing language set forth in a conspicuous manner and substantially similar to the following:

"CREDIT UNION (or name of institution)
TRUST ACCOUNT

G.S. 54-109.57

I understand that by establishing a trust account under the provisions of North Carolina General Statute 54-109.57 that:

1. During my lifetime I may withdraw the money in the account; and
2. By written direction to the credit union (or name of institution) I may change the beneficiary; and
3. Upon my death the money remaining in the account will belong to the beneficiary, and the money will not be inherited by my heirs or be controlled by my will.

________________________"

(a1) This section shall not be deemed exclusive. Deposit accounts not conforming to this section shall be governed by other applicable provisions of the General Statutes or the common law, as appropriate.

(b) Whenever the beneficiary of a trust account does not survive the trustee, then the account and any balance thereof which exists shall be held by the trustee in the trustee's own right and for the trustee's own use and benefit.

(c) No addition to such accounts, nor any withdrawal, payment, or change of beneficiary shall affect the nature of such accounts as trust accounts, or affect the right of a trustee to terminate the account.

(d) Nothing herein contained shall be construed to repeal or modify any of the provisions of G.S. 105-24, relating to the administration of the estate tax laws of this State, or provisions of law relating to estate taxes. (1915, c. 115, s. 14; C.S., s. 5227; 1975, c. 538, s. 1;

1987 (Reg. Sess., 1988), c. 1078, s. 2; 1989, c. 164, s. 6; 1989 (Reg. Sess., 1990), c. 866, s. 8.)

**Effect of Amendments.** — The 1987 (Reg. Sess., 1988) amendment, effective July 1, 1989, rewrote this section.

## § 54-109.58. Joint accounts.

(a) Shares may be issued to and deposits received from any two or more persons opening or holding an account or accounts, but no joint tenant, unless a member in his own right, shall be permitted to vote, obtain loans, or hold office or be required to pay an entrance or membership fee. The account and any balance thereof shall be held by them as joint tenants, with or without right of survivorship, as the contract shall provide; the account may also be held pursuant to G.S. 41-2.1 and have the incidents set forth in that section, provided, however, if the account is held pursuant to G.S. 41-2.1 the contract shall set forth that fact as well. Unless the persons establishing the account have agreed with the credit union that withdrawals require more than one signature, payment by the credit union to, or on the order of, any persons holding an account authorized by this section shall be a total discharge of the credit union's obligations as to the amount so paid. Funds in a joint account established with right of survivorship shall belong to the surviving joint tenant or tenants upon the death of a joint tenant, and the funds shall be subject only to the personal representative's right of collection as set forth in G.S. 28A-15-10(a)(3), or as provided in G.S. 41-2.1 if the account is established pursuant to the provisions of that section. Payment by the credit union of funds in the joint account to a surviving joint tenant or tenants shall terminate the personal representative's authority under G.S. 28A-15-10(a)(3) to collect against the credit union for the funds so paid, but the personal representative's authority to collect such funds from the surviving joint tenant or tenants is not terminated. A pledge of such account by any holder or holders shall, unless otherwise specifically agreed upon, be a valid pledge and transfer of such account, or of the amount so pledged, and shall not operate to sever or terminate the joint ownership of all or any part of the account. Persons establishing an account under this section shall sign a statement showing their election of the right of survivorship in the account, and containing language set forth in a conspicuous manner and substantially similar to the following:

"CREDIT UNION (or name of institution)
JOINT ACCOUNT WITH RIGHT OF
SURVIVORSHIP

G.S. 54-109.58

We understand that by establishing a joint account under the provisions of North Carolina General Statute 54-109.58 that:

1. The credit union (or name of institution) may pay the money in the account to, or on the order of, any person named in

the account unless we have agreed with the credit union that withdrawals require more than one signature; and

2. Upon the death of one joint owner the money remaining in the account will belong to the surviving joint owners and will not pass by inheritance to the heirs of the deceased joint owner or be controlled by the deceased joint owner's will.

We DO elect to create the right of survivorship in this account.

______________________

______________________"

(a1) This section shall not be deemed exclusive. Deposit accounts, not conforming to this section shall be governed by other applicable provisions of the General Statutes or the common law as appropriate.

(b) Nothing herein contained shall be construed to repeal or modify any of the provisions of G.S. 105-24, relating to the administration of the estate tax laws of this State, or provisions of laws relating to estate taxes; the provisions herein shall regulate, govern and protect the credit union in its relationship with such joint owners of accounts as herein provided.

(c) No addition to such account, nor any withdrawal or payment shall affect the nature of the account as a joint account, or affect the right of any tenant to terminate the account. (1975, c. 538, s. 1; 1987 (Reg. Sess., 1988), c. 1078, s. 3; 1989, c. 164, s. 3; 1989 (Reg. Sess., 1990), c. 866, s. 7.)

**Effect of Amendments.** — The 1989 (Reg. Sess., 1990) amendment, effective January 1, 1991, rewrote this section.

### CASE NOTES

**Cited** in Napier v. High Point Bank & Trust Co., 100 N.C. App. 390, 396 S.E.2d 620 (1990).

## § 54-109.59. Liens.

### CASE NOTES

**Statutory lien created by this section is avoidable under federal bankruptcy law.** Petersen v. State Employees Credit Union (In re Kettrell), 115 Bankr. 873 (Bankr. M.D.N.C. 1990).

**Funds Deposited as a Result of Credit Union's Unfair and Deceptive Trade Practices.** — Credit union was not entitled to assert statutory lien under this section on funds in debtor's share account because those funds were deposited in debtor's share account as result of credit union's unfair and deceptive trade practices. Petersen v. State Employees Credit Union (In re Kettrell), 115 Bankr. 873 (Bankr. M.D.N.C. 1990).

**Lien created by this section becomes effective against debtor only when** debtor's financial condition fails to meet a specified financial standard, i.e., when debtor is "past due" with payments to credit union; moreover, if in fact credit union had valid statutory lien on debtor's share account pursuant to this section, then trustee can avoid that lien pursuant to 11 U.S.C. §§ 545(1)(E) and 547(b). Petersen v. State Employees Credit Union (In re Kettrell), 115 Bankr. 873 (Bankr. M.D.N.C. 1990).

## § 54-109.63. Personal agency accounts.

(a) A person may open a personal agency account by written contract containing a statement that it is executed pursuant to the provisions of this section. A personal agency account may be a checking account, savings account, time deposit, or any other type of withdrawable account or certificate. The written contract shall name an agent who shall have authority to act on behalf of the depositor in regard to the account as set out in this subsection. The agent shall have the authority to:

(1) Make, sign or execute checks drawn on the account or otherwise make withdrawals from the account;
(2) Endorse checks made payable to the principal for deposit only into the account; and
(3) Deposit cash or negotiable instruments, including instruments endorsed by the principal, into the account.

A person establishing an account under this section shall sign a statement containing language substantially similar to the following in a conspicuous manner:

"CREDIT UNION (or name of institution)
PERSONAL AGENCY ACCOUNT

G.S. 54-109.63

I understand that by establishing a personal agency account under the provisions of North Carolina General Statute 54-109.63 that the agent named in the account may:

1. Sign checks drawn on the account; and
2. Make deposits into the account.

I also understand that upon my death the money remaining in the account will be controlled by my will or inherited by my heirs.

________________"

(b) An account created under the provisions of this section grants no ownership right or interest in the agent. Upon the death of the principal there is no right of survivorship to the account and the authority set out in subsection (a) terminates.

(c) The written contract referred to in subsection (a) shall provide that the principal may elect to extend the authority of the agent set out in subsection (a) to act on behalf of the principal in regard to the account notwithstanding the subsequent incapacity or mental incompetence of the principal. If the principal so elects to extend such authority of the agent, then upon the subsequent incapacity or mental incompetence of the principal, the agent may continue to exercise such authority, without the requirement of bond or of accounting to any court, until such time as the agent shall receive actual knowledge that such authority has been terminated by a duly qualified guardian of the estate of the incapacitated or incompetent principal or by the duly appointed attorney-in-fact for the incapacitated or incompetent principal, acting pursuant to a durable power of attorney (as defined in G.S. 32A-8) which grants to the attorney-in-fact that authority in regard to the account which is granted to the agent by the written contract executed pursuant to the provisions of this section, at which time the agent shall account to such guardian or attorney-in-fact for all actions of the agent in regard to the account during the incapacity or incompetence of the principal. If the principal does not so elect to extend the authority of the agent, then upon the subsequent incapacity or mental incompetence of the principal, the authority or the agent set out in subsection (a) terminates.

(d) When an account under this section has been established all or part of the account or any interest or dividend thereon may be paid by the credit union on a check made, signed or executed by the agent. In the absence of actual knowledge that the principal has died or that the agency created by the account has been terminated, such payment shall be a valid and sufficient discharge to the credit union for payment so made.

(e) An account established under the provisions of this section does not grant to the agent the authority to vote, obtain loans, or hold office and the agent shall not be required to pay an entrance or membership fee. (1987 (Reg. Sess., 1988), c. 1078, s. 4; 1989, c. 164, s. 9; 1989 (Reg. Sess., 1990), c. 866, s. 9.)

**Effect of Amendments.** — The 1989 (Reg. Sess., 1990) amendment, effective January 1, 1991, substituted "language substantially similar to the following" for "the following language" in the second paragraph of subsection (a).

## ARTICLE 14G.

## *Loans.*

### § 54-109.68. Security.

CASE NOTES

**Attempt to Create Security Interest in Retirement Account by Using Deceptive Trade Practices.** — Practices and actions of credit union in deceiving borrower into thinking that credit union had a valid, enforceable security interest in his retirement account by inserting the word "retirement" in the "other collateral" block on front of loan documents and having debtor sign documents at time of making first loan (which authorized sending employee's retirement checks to credit union and depositing therein and filing away of these forms and applying them to all loans thereafter made) violated public policy of protecting the retirement accounts of teachers and other state employees, having tendency to deceive them regarding their rights as to their retirement accounts. These acts collectively constitute unfair and deceptive trade practices. As debtor was damaged as a result of such practices (in that he lost ability to use his retirement fund for his own needs, including eventual retirement), he was entitled to recover treble damages and attorneys' fees. Petersen v. State Employees Credit Union (In re Kettrell), 115 Bankr. 873 (Bankr. M.D.N.C. 1990).

## ARTICLE 14-I.

## *Investments.*

### § 54-109.82. Investment of funds.

The capital, deposits, undivided profits and reserve fund of the corporation may be invested only in any of the following ways:

(1) They may be lent to the members of the corporation in accordance with the provisions of this Chapter.

(2) In capital shares, obligations, or preferred stock issues of any agency or association organized either as a stock company, mutual association, or membership corporation, provided the membership or stockholdings, as the case may be, of the agency or association are confined or restricted to credit unions or organizations of credit unions, or provided the purpose for which the agency or association is organized or designed is to service or otherwise assist credit union operations.

(3) In obligations of the State of North Carolina or any subdivision thereof.

(4) In obligations of the United States, including bonds and securities upon which payment of principal and interest is fully guaranteed by the United States.

(5) They may be deposited to the credit of the corporation in savings institutions, credit unions, or State banks or trust companies incorporated under the laws of the State, or in national banks located in the State.

(6) In loans to other credit unions in any amount not to exceed twenty-five percent (25%) of the shares and unimpaired surplus of the lending credit union.

(7) In an aggregate amount not to exceed twenty-five percent (25%) of the allocations to the reserve fund in any agency or association of the type described in subdivision (2) of this section provided the purposes of the agency or association are designed to assist in establishing and maintaining liquidity, solvency, and security in credit union operations.

(8) In the North Carolina Savings Guaranty Corporation.

(9) In any form of investment allowed by law to the State Treasurer under G.S. 147-69.1.

(10) Debentures issued by an agency of the United States government.

(11) In the College Foundation in any amount not to exceed ten percent (10%) of the shares and unimpaired surplus of the investing credit union.

(12) They may be deposited in any bank or savings institution insured by the federal government or any of its agencies. (1915, c. 115, s. 18; 1917, c. 232, ss. 2, 3; C.S., s. 5219; 1925, c. 73, ss. 12, 13, 14; 1935, c. 87; 1939, c. 400, s. 1; 1947, c. 781; 1965, c. 956, ss. 10, 11; 1969, c. 69, s. 1; 1973, c. 199, s. 4; c. 1255, s. 1; 1975, c. 538, s. 1; 1977, c. 559, s. 7; 1979, c. 467, s. 23; c. 809, s. 2; 1991, c. 651, s. 4; 1991 (Reg. Sess., 1992), c. 1030, s. 51.11.)

**Effect of Amendments.** — The 1991 amendment, effective October 1, 1991, in the first sentence, inserted "only" and deleted "and in such ways only" following "following ways"; in subdivision (2), substituted "the agency" for "such agency" in two places, and substituted "purpose" for "purposes" and inserted "is" following "designed"; in subdivision (5), substituted "savings institutions, credit unions, or" for "savings banks, credit unions, savings and loan associations" and substituted "in the State" for "therein"; in subdivision (7), substituted "of this section" for "hereof" and inserted "the" preceding "agency"; deleted "which are" following "Debentures" in subdivision (10); and rewrote subdivision (12).

The 1991 (Reg. Sess., 1992) amendment, effective July 24, 1992, deleted "any such" preceding "the agency or association" in subdivision (7).

## ARTICLE 14M.

## *Confidential Information.*

### § 54-109.105. (See editor's note for date change) What information deemed confidential; disclosure; certain information deemed public; exchange of information.

(a) The following records of information of the credit union division, the Administrator or the agent(s) of either shall be confidential and shall not be disclosed:

(1) Information obtained or compiled in preparation of, during, or as a result of an examination, audit or investigation of any credit union;

(2) Information reflecting the specific collateral given by a named borrower, or specific withdrawable accounts held by a named member;

(3) Information obtained, prepared or compiled during or as a result of an examination, audit or investigation of any credit union by an agency of the United States, if the records would be confidential under federal law or regulation;

(4) Information and reports submitted by credit unions to federal regulatory agencies, if the records or information would be confidential under federal law or regulation;

(5) Information and records regarding complaints from the members received by the division which concern credit unions when the complaint would or could result in an investigation, except to the management of those credit unions;

(6) Any other letters, reports, memoranda, recordings, charts or other documents or records which would disclose any information of which disclosure is prohibited in this subsection.

(b) A court of competent jurisdiction may order the disclosure of specific information.

(c) The information contained in an application for a new credit union shall be deemed to be public information.

(d) Nothing in this Article shall prevent the exchange of information relating to credit unions and the business thereof with the representatives of the agencies of this State, other states, or of the

United States, or with reserve or insuring agencies for credit unions. Nothing in this Article shall prevent the Administrator, in his discretion, from disclosing pertinent information relating to a credit union and the business thereof with directors, officers, or members of the credit union. The private business and affairs of an individual or company shall not be disclosed by any person employed by the credit union division, or by any person with whom information is exchanged under the authority of this subsection.

(e) Any official or employee violating this section shall be liable to any person injured by disclosure of such confidential information for all damages sustained thereby. Penalties provided shall not be exclusive of other penalties.

(f) **(Effective October 1, 1994 — See editor's note)** The willful or knowing violation of the provisions of this Article by any employee of the credit union division shall be a Class 1 misdemeanor. (1981, c. 512; 1993, c. 539, s. 429; 1994, Ex. Sess., c. 24, s. 14(c).)

**Editor's Note.** — Session Laws 1993, c. 539, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

**Effect of Amendments.** — The 1993 amendment, effective October 1, 1994, and applicable to offenses occurring on or after that date, inserted "Class 1" preceding "misdemeanor" in subsection (f).

## ARTICLE 14N.

## *Foreign Credit Unions.*

### § 54-109.106. Foreign Credit Unions.

(a) A credit union organized under the laws of another state or territory of the United States may conduct business as a credit union in this State with the approval of the Administrator, provided credit unions incorporated under Articles 14A through 14M of this Chapter are allowed to do business in the other state under conditions similar to these provisions. Before granting the approval, the Administrator must find that the foreign credit union:

(1) Is a credit union organized under laws similar to Articles 14A through 14M of this Chapter;
(2) Is financially solvent;
(3) Has account insurance through the federal government or any agency thereof;
(4) Is examined and supervised by a regulatory agency of the state in which it is organized;
(5) Will serve a field of membership not being served in this State or to adequately serve its members in this State;
(6) Operation by the credit union will not have adverse impact on the financial, economic or other interests of residents of this State.

(b) No foreign credit union may conduct business in this State unless it:

(1) Makes loans at such terms allowed under the provisions of Article 14G of this Chapter;

(2) Complies with the rules and regulations applicable to credit unions incorporated under Articles 14A through 14M of this Chapter;

(3) Agrees to furnish the Administrator a copy of the report of examination of its regulatory agency and such other documents or reports as may be requested or to submit to an examination as the Administrator deems necessary;

(4) Designates and maintains an agent for the service of process in this State.

(c) The Administrator may deny or revoke approval of a credit union to conduct business in this State if the Administrator finds that:

(1) The credit union fails to meet the requirements of subsection (a);

(2) The credit union fails to comply with the laws of this State or lawful rules or orders issued by the Administrator;

(3) The credit union has engaged in a pattern of unsafe or unsound credit union practices. (1991, c. 271, s. 1.)

**Editor's Note.** — Session Laws 1991, c. 271, s. 2, made this Article effective October 1, 1991.

# SUBCHAPTER V. MARKETING ASSOCIATIONS.

## ARTICLE 19.

## *Purpose and Organization.*

### § 54-139. Foreign cooperative corporations; limitation on use of word "cooperative."

(a) A foreign corporation (with or without capital stock) that can qualify as an association, as defined in G.S. 54-130(2)b1 and 2, may be authorized to transact business in this State under the provisions of Chapter 55A of the General Statutes.

(b) No person other than an association organized under this Subchapter, or a foreign corporation authorized to transact business in this State pursuant to subsection (a) of this section, or an electric or telephone membership corporation domesticated pursuant to G.S. 117-28, or an organization created under or governed by Subchapter IV of Chapter 54 of the General Statutes, shall be entitled to organize, domesticate, or transact business in this State if the corporate or other business name or title of such person contains the word "cooperative." (1921, c. 87, s. 21; C.S., s. 5259(k); 1963, c. 1168, s. 8; 1985, c. 542, s. 8; 1993, c. 552, s. 20.)

**Effect of Amendments.** — The 1993 amendment, effective October 1, 1993, in the section catchline substituted "Foreign" for "Domestication of foreign"; in subsection (a) inserted "(with or without capital stock)", deleted "under the provisions of Article 8, Chapter 55A, if it be a nonstock corporation, or under the provisions of Article 10, Chapter 55, if it be a stock corporation" following "may" and added at the end "under the provisions of Chapter 55A of the General Statutes"; and in subsection (b) substituted "authorized to transact business in this State" for "domesticated".

### § 54-142. Application of North Carolina Business Corporation Act to cooperative associations with capital stock.

The provisions of the North Carolina Business Corporation Act (Chapter 55 of the General Statutes) shall apply, so far as appropriate, to every cooperative association with capital stock heretofore or hereafter organized or domesticated under this Subchapter, except where the provisions of that act are in conflict with or inconsistent with the express provisions of this Subchapter. (1921, c. 87, s. 28; C.S., s. 5259(o); 1963, c. 1168, s. 9; 1989 (Reg. Sess., 1990), c. 1024, s. 3.)

**Effect of Amendments.** — The 1989 (Reg. Sess., 1990) amendment, effective July 1, 1990, substituted "North Carolina Business Corporation Act" for "Business Corporation Act" in the catchline and within the section.

## ARTICLE 21.

## *Powers, Duties, and Liabilities.*

### § 54-157. (Effective October 1, 1994 — See editor's note) Breach of marketing contract of cooperative association; spreading false reports about the finances or management thereof; misdemeanor.

Any person or persons, or any corporation whose officers or employees knowingly induces or attempts to induce any member or stockholder of an association organized hereunder to breach his marketing contract with the association, or who maliciously and knowingly spreads false reports about the finances or management thereof shall be guilty of a Class 2 misdemeanor and subject only to a fine of not less than one hundred dollars ($100.00), and not more than one thousand dollars ($1,000), for such offense and shall be liable to the association aggrieved in a civil suit in the penal sum of five hundred dollars ($500.00) for each such offense: Provided, that this section shall not apply to a bona fide creditor of any member or stockholder of such association, or the agents or attorney of any such bona fide creditor, endeavoring to make collection of the indebtedness, or to any communication, written or oral, between a business company or concern and persons with whom it has an existing contractual relationship which communication relates to the performance of that contractual relationship and duties and responsibilities arising therefrom. (1921, c. 87, s. 25; C.S., s. 5259(dd); 1963, c. 1168, s. 14; 1993, c. 539, s. 430; 1994, Ex. Sess., c. 24, s. 14(c).)

**Editor's Note.** — Session Laws 1993, c. 539, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

**Effect of Amendments.** — The 1993 amendment, effective October 1, 1994, and applicable to offenses occurring on or after that date, inserted "Class 2" preceding "misdemeanor" and inserted "only" following "subject".

## ARTICLE 22.

## *Merger, Consolidation and Other Fundamental Changes.*

### § 54-166. Rights of objecting members.

CASE NOTES

Cited in Ferrell v. DOT, 334 N.C. 650, 435 S.E.2d 309 (1993).

# Chapter 54B.

# Savings and Loan Associations.

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## ARTICLE 3.

## *Fundamental Changes.*

### § 54B-34.1. Conversion to State association.

(a) A savings bank or State or national bank, upon a majority vote of its board of directors, may apply to the Administrator for permission to convert to a State association and for certification of appropriate amendments to its certificate of incorporation to effect the change. Upon receipt of an application to convert to a State association, the Administrator shall examine all facts connected with the conversion. The depository institution applying for permission to convert shall pay all the expenses and costs of examination.

(b) The converting depository institution shall submit a plan of conversion as a part of the application to the Administrator. The Administrator may approve it with or without amendment. If the Administrator approves the plan, then the plan shall be submitted to the members or stockholders as provided in subsection (c) of this section. If the Administrator refuses to approve the plan, the Administrator's objections shall be stated in writing and the converting depository institution shall be given an opportunity to amend its plan to obviate the objections or to appeal the Administrator's decision to the Commission.

(c) After lawful notice to the members or stockholders of the converting depository institution and full and fair disclosure, the substance of the plan shall be approved by a majority of the votes or shares present, in person or by proxy. Following the vote of the members or stockholders, the results of the vote certified by an appropriate officer of the converting depository institution shall be filed with the Administrator. The Administrator shall then either approve or disapprove the requested conversion to a State association. After approval of the conversion, the Administrator shall supervise and monitor the conversion process and shall ensure that the conversion is conducted lawfully and under the approved plan of conversion. (1993, c. 163, s. 5.)

**Editor's Note.** — Session Laws 1993, c. 163, s. 7 made this section effective October 1, 1993.

## § 54B-34.2. Conversion to bank.

(a) A savings and loan association, upon a majority vote of its board of directors, may apply to the Administrator for permission to convert to a bank, as defined under G.S. 53-1(1), or to a national bank or other form of depository institution and for certification of appropriate amendments to its certificate of incorporation to effect the change. Upon receipt of an application to so convert, the Administrator shall examine all facts connected with the conversion including receipt of approval of the converting institution's plan of conversion by other federal or state regulatory agencies having jurisdiction over the institution upon completion of its conversion. The depository institution applying for permission to convert shall pay all the expenses and costs of examination.

(b) The converting depository institution shall submit a plan of conversion as a part of the application to the Administrator. The Administrator may approve it with or without amendment. If the Administrator approves the plan, then the plan shall be submitted to the members or stockholders as provided in subsection (c) of this section. If the Administrator refuses to approve the plan, the Administrator's objections shall be stated in writing and the converting depository institution shall be given an opportunity to amend its plan to obviate the objections or to appeal the Administrator's decision to the Commission.

(c) After lawful notice to the members or stockholders of the converting depository institution and full and fair disclosure, the substance of the plan shall be approved by the members or the shareholders at a duly called and properly convened meeting of the members or shareholders. Following the meeting of the members or shareholders, the results of the vote certified by an appropriate officer of the converting depository institution shall be filed with the Administrator. The Administrator shall then either approve or disapprove the requested conversion to a bank, national bank, or other form of depository institution. After approval of the conversion, the Administrator shall supervise and monitor the conversion process and shall ensure that the conversion is conducted lawfully and under the approved plan of conversion. (1993, c. 163, s. 5.)

**Editor's Note.** — Session Laws 1993, c. 163, s. 7 made this section effective October 1, 1993.

## ARTICLE 4.

## *Supervision and Regulation.*

### § 54B-56. (Effective October 1, 1994 — See editor's note) Examinations by Administrator; report.

(a) If at any time the Administrator deems it prudent, it shall be his duty to examine and investigate everything relating to the business of a State association or a savings and loan holding company, and to appoint a suitable and competent person to make such investigation, who shall file with the Administrator a full report of his finding in such case, including in his report any violation of law or any unauthorized or unsafe practices of the association disclosed by his examination.

(b) The Administrator shall furnish a copy of the report to the association examined and may, upon request, furnish a copy of or excerpts from the report to the appropriate federal regulatory authorities.

(c) **(Effective October 1, 1994 — See editor's note)** No association may willfully delay or willfully obstruct an examination in any fashion. Any person failing to comply with this subsection shall be guilty of a Class 1 misdemeanor.

(d) **(Effective October 1, 1994 — See editor's note)** No person having in his possession or control any books, accounts or papers of any State association shall refuse to exhibit same to the Administrator or his agents on demand, or shall knowingly or willingly make any false statement in regard to the same. Any person failing to comply with this subsection shall be guilty of a Class 1 misdemeanor. (1981, c. 282, s. 3; 1989 (Reg. Sess., 1990), c. 806, s. 5; 1993, c. 539, ss. 431, 432; 1994, Ex. Sess., c. 24, s. 14(c).)

**Editor's Note.** — Session Laws 1993, c. 539, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

**Effect of Amendments.** — The 1993 amendment, effective October 1, 1994, and applicable to offenses occurring on or after that date, inserted "Class 1" preceding "misdemeanor" in subsections (c) and (d).

### § 54B-66. (Effective October 1, 1994 — See editor's note) Criminal penalties.

(a) The provisions of this section shall in no event extend to persons who are found to have acted only with gross negligence, simple negligence, recklessness or incompetence.

(b) In addition to any of the other penalties or remedies provided by this Article, the following shall be deemed to be Class 1 misdemeanors:

(1) The willful or knowing violation of the provisions of this Article by any employee of the Savings Institutions Division.

(2) The willful or knowing violation of a cease and desist order which has become final in that no further administrative or judicial appeal is available.

(c) In addition to any of the other penalties or remedies provided by this Article, the willful omission, making, or concurrence in making or publishing a written report, exhibit, or entry in a financial statement on the books of the association, which contains a material statement known to be false shall be deemed to be a Class 1 misdemeanor. For purposes of this section, "material" shall mean "so substantial and important as to influence a reasonable and prudent businessman or investor."

(d) The Administrator is authorized to enforce this section in a court of competent jurisdiction. (1981, c. 282, s. 3; 1989, c. 76, s. 22; 1993, c. 539, s. 433; 1994, Ex. Sess., c. 24, s. 14(c).)

**Editor's Note.** — Session Laws 1993, c. 539, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

**Effect of Amendments.** — The 1993 amendment, effective October 1, 1994, and applicable to offenses occurring on or after that date, substituted "Class 1 misdemeanors" for "misdemeanors and shall be punishable as provided in Chapter 14 of the North Carolina General Statutes" in subsection (b) and "Class 1 misdemeanor" for "misdemeanor and shall be punishable as provided in Chapter 14 of the North Carolina General Statutes" in subsection (c).

## § 54B-75. Statement; fees.

Every State association shall file in the office of the Administrator, on or before the first day of February in each year, in such form as the Administrator shall prescribe, a statement of the business standing and financial condition of such association on the preceding 31st day of December. This statement shall be signed and sworn to by the secretary or other officer duly authorized by the board of directors of the association before a notary public. The statement shall be accompanied by a filing fee set by the Administrator, subject to the advice and consent of the Commission. The filing fees shall be used to defray the expenses incurred by the Division in supervising State associations. (1981, c. 282, s. 3; 1985, c. 659, s. 12; 1993, c. 163, s. 1.)

**Effect of Amendments.** — The 1993 amendment, effective October 1, 1993, inserted "or other officer duly authorized by the board of directors" following "by the secretary" in the second sentence.

## § 54B-76. Statement examined, approved, and published.

It shall be the duty of the Administrator to receive and thoroughly examine each annual statement required by G.S. 54B-75, and if made in compliance with the requirements thereof, each State association shall at its own expense, publish an abstract of the same in a newspaper having general circulation within each market area of the association as selected by the managing officer. (1981, c. 282, s. 3; 1993, c. 163, s. 2.)

**Effect of Amendments.** — The 1993 amendment, effective October 1, 1993, inserted "at its own expense," following "each State association shall" and substituted "a newspaper having general circulation within each market area of the association as selected by the managing officer" for "one of the newspapers of the State to be selected by the managing officer making the statement, and at the expense of the association."

## § 54B-78. (Effective October 1, 1994 — See editor's note) Prohibited practices.

Any person or association who shall engage in any of the following acts or practices shall be guilty of a Class 1 misdemeanor:

(1) Defamation: Making, publishing, disseminating, or circulating, directly or indirectly, or aiding, abetting, or encouraging the making, publishing, disseminating, or circulating of any oral, written, or printed statement which is false regarding the financial condition of any association.

(2) False information and advertising: Making, publishing, disseminating, or circulating or causing, directly or indirectly, to be made published, disseminated, circulated, or otherwise placed before the public in any publication, media, notice, pamphlet, letter, poster, or any other way, an advertisement, announcement, or statement containing any assertion, representation, or statement with respect to the savings and loan business or with respect to any person in the conduct of the savings and loan business which is untrue, deceptive, or misleading. (1985, c. 659, s. 13; 1993, c. 539, s. 434; 1994, Ex. Sess., c. 24, s. 14(c).)

**Editor's Note.** — Session Laws 1993, c. 539, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

**Effect of Amendments.** — The 1993 amendment, effective October 1, 1994, and applicable to offenses occurring on or after that date, substituted "Class 1 misdemeanor" for "misdemeanor, and upon conviction thereof shall be fined or imprisoned, or both, in the discretion of the court".

## ARTICLE 13.

## *Savings and Loan Holding Companies.*

**§§ 54B-263, 54B-264:** Reserved for future codification purposes.

## ARTICLE 14.

## *Savings and Loan Interstate Branches.*

### § 54B-265. Title.

This Article shall be known and may be cited as the North Carolina Savings and Loan Interstate Branch Act. (1993, c. 191, s. 2.)

**Editor's Note.** — Session Laws 1993, c. 191, s. 4 made this Article effective October 1, 1993.

### § 54B-266. Definitions.

As used in this Article, unless the context clearly requires otherwise, the following definitions apply:

(1) "Administrator" means the Administrator of the Savings Institution Division.

(2) "Association" means a savings and loan association and includes a State association or a federal association unless limited by use of the words "State" or "federal".

(3) "Branch" means a full-service office of an association through which it renders a savings and loan service other than its principal office. An association may engage in any authorized function or service through an authorized branch office.

(4) "Commission" means the North Carolina Savings Institution Commission.

(5) "Home state" means (i) as to a state association, the state which granted the association its charter, and (ii) as to a federal association, the state in which the association has its principal office.

(6) "Out-of-state association" means an association chartered by any state other than this State and whose principal office is not within this State.

(7) "State association" means an association chartered under the laws of this State.

(8) "Supervisor" means the state association supervisor or equivalent state official having primary regulatory authority over an out-of-state association. (1993, c. 191, s. 2.)

### § 54B-267. Establishment of branches by out-of-state associations.

Any out-of-state association that meets the requirements of this Article may establish a branch within North Carolina either by (i) de novo entry; (ii) the purchase of an existing branch; (iii) the purchase of all or substantially all of the assets of a State association located in North Carolina; or (iv) merger or consolidation. (1993, c. 191, s. 2.)

## § 54B-268. Application requirements.

(a) Any out-of-state association desiring to establish a branch office under this Article shall file with the Administrator a written application meeting the following requirements:

(1) The out-of-state association shall agree to comply with all the applicable rules and regulations, and informational filing requirements contained in the laws and rules of this State that would apply to a State association engaging in an equivalent form of transaction. Additionally, the Administrator shall apply the same standards of approval to the application of the out-of-state association as would apply to an application by a State association for an equivalent form of transaction.

(2) The out-of-state association shall provide the Administrator, in the manner prescribed by the Administrator, with such additional information as the Administrator deems necessary, to fully evaluate the application.

(3) The out-of-state association shall pay an application fee established by the Administrator pursuant to G.S. 54B-9.

(4) The out-of-state association shall not commence operations of the branch office until it has received the written approval of the Administrator.

(b) The Administrator shall act on the application within 90 days of receipt of the completed application. (1993, c. 191, s. 2.)

## § 54B-269. Conditions for approval.

No application by an out-of-state association received under this Article may be finally approved by the Administrator unless:

(1) The Administrator has received in writing approval of the proposed transaction from the supervisor of the out-of-state association;

(2) The supervisor of the out-of-state association agrees in writing to share with the Administrator examination reports prepared by the supervisor and any other information deemed necessary by the Administrator regarding the out-of-state association;

(3) The out-of-state association agrees in writing to make available to the Administrator all information that may be required to effectively examine the association;

(4) The out-of-state association agrees in writing that so long as it maintains a branch in North Carolina, it will meet the conditions set forth in this Article and comply with all applicable North Carolina laws and any rules issued thereunder, as well as any orders or directives issued to the association by the Administrator;

(5) The home state of the out-of-state association permits associations chartered under the laws of this State to establish branches within its border; and

(6) The out-of-state association designates and files with the Office of the Secretary of State a document appointing an agent in this State to receive service of judicial process. (1993, c. 191, s. 2.)

## § 54B-270. Special conditions.

(a) The Administrator may require an out-of-state association to designate one of its branches in North Carolina as a "headquarters branch" and may, by rule, require that reports, books, and records required of associations doing business under this Article be available at the designated headquarters branch.

(b) Once an out-of-state association has established at least one branch in North Carolina pursuant to this Article, subsequent applications to establish additional branches shall be considered on the same basis as an application of a State association to establish an additional branch pursuant to G.S. 54B-22.

(c) If an out-of-state association establishes a branch or branches by merger with or purchase from an association located in this State, and the out-of-state association and the association located in this State are both owned by the same holding company, any conditions, limitations, or restrictions placed on the holding company, pursuant to Articles 3A and 13 of this Chapter, shall continue to apply to both the acquiring out-of-state association and its holding company. (1993, c. 191, s. 2.)

## § 54B-271. Powers.

An out-of-state association that establishes a branch in North Carolina may engage in all the activities authorized by North Carolina law for a State association except to the extent that such activities have been expressly prohibited by the state supervisor of the out-of-state association or the laws of the out-of-state association's home state. (1993, c. 191, s. 2.)

## § 54B-272. Establishment of out-of-state branches by state associations.

With the prior consent of the Administrator, any association chartered under the laws of North Carolina may establish a branch in any other state in accordance with the laws of such other state. (1993, c. 191, s. 2.)

## § 54B-273. Regulatory and supervisory oversight.

(a) The Administrator may enter into such agreements as necessary regarding the scope, timing, coordination, and frequency of examinations and other supervisory matters, including the sharing of information gathered in such examinations, with other supervisors and federal association regulators. This authority applies to both out-of-state associations and their holding companies.

(b) The Administrator may require periodic reports on the financial condition of any out-of-state association or its holding company that maintains a branch within North Carolina and may from time to time require from any such out-of-state associations other reports under oath in such scope and detail as the Administrator may reasonably determine to be necessary for the purpose of assuring continuing compliance with the provisions of this Article.

(c) The Administrator may, if necessary, conduct full-scope, on-site examinations of any branch established pursuant to this Article.

(d) Out-of-state associations shall be assessed and required to pay supervisory and examination fees in accordance with G.S. 54B-57 and the rules issued thereunder. (1993, c. 191, s. 2.)

## § 54B-274. Enforcement.

(a) Any enforcement authority available to the Administrator for use against a State association may, subject to the provisions of Chapter 150B of the General Statutes, be used against a branch established under this Article and against the out-of-state association or its parent holding company establishing such branch.

(b) The Administrator may suspend or revoke the authority of an out-of-state association to establish or maintain a branch in North Carolina upon a finding of fact or condition or circumstance that is grounds for denial of an application to establish and maintain a branch under this Article.

(c) The Administrator may enforce the provisions of this Article through an action in any court of North Carolina or any other state or any court of the United States as provided in G.S. 54B-64, 54B-65, 54B-66, and 54B-68 for the purpose of obtaining an appropriate remedy for violation of any provisions of this Article.

(d) The Administrator may enter into joint actions with other supervisors or federal association regulators, or both, having concurrent jurisdiction over any out-of-state association that has a branch in North Carolina or over any State association that has a branch in another state, or may take such action independently to carry out the Administrator's responsibilities under this Article and assure compliance with the provisions of this Article and the applicable association laws of this State. (1993, c. 191, s. 2.)

## § 54B-275. Branch closings.

An out-of-state association that is subject to an order or written agreement revoking its authority to establish or maintain a branch in North Carolina and any State association that is subject to an order or written agreement revoking its authority to establish or maintain a branch in another state shall wind up the business of that branch in an orderly manner that protects the depositors, customers, and creditors of the branch, and that complies with all North Carolina laws and all other applicable laws regarding the closing of the branch. (1993, c. 191, s. 2.)

## § 54B-276. Rules.

The Commission may adopt rules as necessary to carry out the provisions of this Article. (1993, c. 191, s. 2.)

## § 54B-277. Appeal of administrator's decision.

Any aggrieved party in a proceeding under this Article may, within 30 days after final decision of the Administrator, appeal such decision to the Commission. The Commission, within 30 days of receipt of the notice of appeal, shall approve, disapprove, or modify the Administrator's decision. Failure of the Commission to act within 30 days of receipt of notice of appeal shall constitute a final decision of the Commission approving the decision of the Administrator. Notwithstanding any other provision of law, any aggrieved party to a decision of the Commission shall be entitled to an appeal pursuant to G.S. 54B-16. (1993, c. 191, s. 2.)

## § 54B-278. Severability.

If any provision of this Article or the application of such provision to any persons or circumstances is found invalid, the remainder of this Article and its application to persons or circumstances other than those as to which it is held invalid, shall not be affected. (1993, c. 191, s. 2.)

# Chapter 54C.
# Savings Banks.

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54C-4. Definitions and application of terms.

### Article 2.
### Incorporation and Organization.

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## ARTICLE 1.

## *General Provisions.*

### § 54C-4. Definitions and application of terms.

(a) Except with respect to this Chapter and Chapter 54B, the term "savings and loan association" when used in the General Statutes shall include savings banks chartered under this Chapter.

(b) Unless the context otherwise requires, the following definitions apply in this Chapter:

(1) Administrator. — The Administrator of the Savings Institution Division.

(2) Affiliate. — Any person or corporation that controls, is controlled by, or is under common control with a savings institution.

(3) Associate. — Any person's relationship with (i) any corporation or organization, other than the applicant or a majority-owned subsidiary of the applicant, of which the person is an officer or partner or is, directly or indirectly, the beneficial owner of ten percent (10%) or more of any class of equity securities, (ii) any trust or other estate in which the person has a substantial beneficial interest or as to which the person serves as trustee or in a similar fiduciary capacity, and (iii) any relative or spouse who lives in the same house as that person, or any relative of that person's spouse who lives in the same house as that person, or who is a director or officer of the applicant or any of its parents or subsidiaries.

(4) Association. — A savings and loan association as defined by G.S. 54B-4(b)(5).

(5) Branch office. — An office of a savings bank, other than its principal office, that renders savings institution services.

(6) Capital stock. — Securities that represent ownership of a stock savings bank.

(7) Certificate of incorporation or charter. — The document that represents the corporate existence of a State savings bank.

(8) Commission. — The North Carolina Savings Institutions Commission.

(9) Conflict of interest. — A matter before the board of directors in which one or more of the directors, officers, or employees has a direct or indirect financial interest in its outcome.

(10) Control. — The power, directly or indirectly, to direct the management or policies of a savings bank or to vote twenty-five percent (25%) or more of any class of voting securities for a savings bank.

(11) Depository institution. — A person, firm, or corporation engaged in the business of receiving, soliciting, or accepting money or its equivalent on deposit, or of lending money or its equivalent, or of both.

(12) Disinterested directors. — Those directors who have absolutely no direct or indirect financial interest in the matter before them.

(13) Dividends on stock. — The earnings of a savings bank paid out to holders of capital stock in a stock savings bank.

(14) Division. — The Savings Institutions Division.

(15) Examination and investigation. — A supervisory inspection of a savings bank or proposed savings bank that may include inspection of every relevant piece of information including subsidiary or affiliated businesses.

(16) Immediate family. — One's spouse, father, mother, children, brothers, sisters, and grandchildren; and the father, mother, brothers, and sisters of one's spouse; and the spouse of one's child, brother, or sister.

(17) Insurance of deposit accounts. — Insurance on a savings bank's deposit accounts when the beneficiary is the holder of the insured account.

(18) Loan production office. — An office of a savings bank other than the principal or branch offices whose activities are limited to the generation of loans.

(19) Members. — Deposit account holders and borrowers in a State mutual savings bank.

(20) Mutual savings bank. — A savings bank owned by members of the savings bank and organized under this Chapter.

(21) Net worth. — A savings bank's total assets less total liabilities as defined by generally accepted accounting principles plus unallocated, general loan loss reserves.

(22) Original incorporators. — One or more natural persons who are the organizers of a State savings bank responsible for the business of a proposed savings bank from the filing of the application to the Commission's final decision on the application.

(23) Plan of conversion. — A detailed outline of the procedure of the conversion of a savings institution from one to another regulatory authority, from one to another form of ownership, or from one to another charter.

(24) Principal office. — The office that houses the headquarters of a savings bank.

(25) Proposed savings bank. — An entity in organizational procedures before the Commission's final decision on its charter application.

(26) Registered agent. — The person named in the certificate of incorporation upon whom service of legal process is deemed binding upon the savings bank.

(27) Savings bank. — A State savings bank or a federal savings bank, unless limited by use of the words "State" or "federal".

(28) Savings institution. — Either an association or a savings bank.

(29) Service corporation. — A corporation operating under Article 7 of this Chapter that engages in activities determined by the rules of the Administrator to be incidental to the conduct of a depository institution business as provided in this Chapter, or engages in activities that further or facilitate the corporate purposes of a savings bank, or furnishes services to a savings bank or subsidiaries of a savings bank, the voting stock of which is owned directly or indirectly by one or more savings institutions.

(30) State savings bank. — A depository institution organized and operated under this Chapter; or a corporation organized under federal law and so converted as to be operated under this Chapter.

(31) Stock savings bank. — A savings bank owned by holders of capital stock and organized under this Chapter.

(32) Voluntary dissolution. — The dissolution and liquidation of a savings bank initiated by its ownership. (1991, c. 680, s. 1; 1991 (Reg. Sess., 1992), c. 829, s. 4.)

**Effect of Amendments.** — The 1991 (Reg. Sess., 1992) amendment, effective July 2, 1992, added "Except with respect to this Chapter and Chapter 54B" at the beginning of subsection (a).

## ARTICLE 2.

## *Incorporation and Organization.*

### § 54C-9. Application to organize a savings bank.

(a) The original incorporators, a majority of whom shall be domiciled in this State, may organize and establish a savings bank in order to promote the purposes of this Chapter, subject to approval as provided in this Chapter. The original incorporators shall file with the Administrator a preliminary application to organize a State savings bank in the form to be prescribed by the Administrator, together with the proper nonrefundable application fee.

(b) The Administrator shall receive the application to organize a State savings bank not less than 60 days before the scheduled consideration of the application by the Commission. The application shall contain the following:

(1) The original of the certificate of incorporation, which shall be signed by the original incorporators, or a majority of them, and shall be properly acknowledged by a person duly authorized by this State to take proof or acknowledgment of deeds; and two conformed copies;

(2) The names and addresses of the incorporators; and the names and addresses of the initial members of the board of directors;

(3) Statements of the anticipated receipts, expenditures, earnings, and financial condition of the savings bank for its first three years of operation, or any longer period as the Administrator may require;

(4) A showing satisfactory to the Commission that:

a. The public convenience and advantage will be served by the establishment of the proposed savings bank;

b. There is a reasonable demand and necessity in the community that will be served by the establishment of the proposed savings bank;

c. The proposed savings bank will have a reasonable probability of sustaining profitable and beneficial operations within a reasonable time in the community in which the proposed savings bank intends to locate;

d. The proposed savings bank, if established, will promote healthy and effective competition in the community in the delivery to the public of savings institution services;

(5) The proposed bylaws; and

(6) Statements, exhibits, maps, and other data that may be prescribed or requested by the Administrator, which data shall be sufficiently detailed and comprehensive so as to enable the Administrator to pass upon the criteria set forth in this Article.

(c) The application shall be signed by the original incorporators, or a majority of them, and shall be properly acknowledged by a person duly authorized by this State to take proof and acknowledgment of deeds. (1991, c. 680, s. 1; 1991 (Reg. Sess., 1992), c. 829, s. 5.)

**Effect of Amendments.** — The 1991 (Reg. Sess., 1992) amendment, effective July 2, 1992, substituted "less than 60 days" for "less then 60 days" in the first sentence of the introductory paragraph of subsection (b).

## § 54C-26. Branch offices closed.

The Board of a State savings bank may discontinue the operation of a branch office upon giving at least 90 days prior written notice to the Administrator and depositors, the notice to include the date upon which the branch office shall be closed. (1991, c. 680, s. 1; 1991 (Reg. Sess., 1992), c. 829, s. 6.)

**Effect of Amendments.** — The 1991 (Reg. Sess., 1992) amendment, effective July 2, 1992, substituted "at least 90 days" for "at least 30 days" and inserted "and depositors."

## ARTICLE 3.

## *Corporate Changes.*

## § 54C-30. Conversion to savings bank.

(a) An association or State or national bank, upon a majority vote of its board of directors, may apply to the Administrator for permission to convert to a State savings bank and for certification of appropriate amendments to its certificate of incorporation to effect the change. Upon receipt of an application to convert to a State savings bank, the Administrator shall examine all facts connected with the conversion. The depository institution applying for permission to convert shall pay all the expenses and cost of the examination.

(b) The converting depository institution shall submit a plan of conversion as a part of the application to the Administrator. The Administrator may approve it with or without amendment. If the Administrator approves the plan, then the plan shall be submitted to the members or stockholders as provided in subsection (c) of this section. If the Administrator refuses to approve the plan, the objections shall be stated in writing and the converting depository institution shall be given an opportunity to amend the plan to obviate the objections or to appeal the Administrator's decision to the Commission.

(c) After lawful notice to the members or stockholders of the converting depository institution and full and fair disclosure, the substance of the plan shall be approved by a majority of the votes or shares present, in person or by proxy. Following the vote of the members or stockholders, the results of the vote certified by an appropriate officer of the converting depository institution shall be filed with the Administrator. The Administrator shall then either approve or disapprove the requested conversion to a State savings bank. After approval of the conversion, the Administrator shall supervise and monitor the conversion process and shall ensure that the conversion is conducted lawfully and under the approved plan of conversion. (1991, c. 680, s. 1; 1991 (Reg. Sess., 1992), c. 829, s. 7.)

**Effect of Amendments.** — The 1991 (Reg. Sess., 1992) amendment, effective July 2, 1992, substituted "majority of the votes or shares present, in person or by proxy" for "majority of the total votes that members or stockholders of the institution are eligible and entitled to cast. The vote by the members or stockholders may be in person or by proxy" in the present first sentence of subsection (c).

## § 54C-33. Conversion of mutual to stock savings bank.

(a) A mutual savings bank may convert from mutual to the stock form of ownership as provided in this section.

(b) A mutual savings bank may apply to the Administrator for permission to convert to a stock savings bank and for certification of appropriate amendments to the savings bank's certificate of incorporation. Upon receipt of an application to convert from mutual to stock form the Administrator shall examine all facts connected with the requested conversion. The savings bank applying for permission to convert shall pay all expenses and cost of the examination, monitoring, and supervision.

(c) The savings bank shall submit a plan of conversion as a part of the application to the Administrator. The Administrator may approve it with or without amendment, if it appears that:

(1) After conversion the savings bank will be in sound financial condition and will be soundly managed;

(2) The conversion will not impair the capital of the savings bank nor adversely affect the savings bank's operations;

(3) The conversion will be fair and equitable to the members of the savings bank and no person whether member, employee, or otherwise, will receive any inequitable gain or advantage by reason of the conversion;

(4) The savings bank services provided to the public by the savings bank will not be adversely affected by the conversion;

(5) The substance of the plan has been approved by a vote of two-thirds of the board of directors of the savings bank;

(6) All shares of stock issued in connection with the conversion are offered first to the members of the savings bank; except that any one or more tax qualified employee stock benefit plans may first purchase in the aggregate not more than ten percent (10%) of the total offering of shares;

(7) All stock shall be offered to members of the savings bank and others in prescribed amounts and otherwise under a

formula and procedure that is fair and equitable and will be fairly disclosed to all interested persons; and

(8) The plan provides a statement as to whether stockholders shall have preemptive rights to acquire additional or treasury shares of the savings bank.

If the Administrator approves the plan, then the plan shall be submitted to the members as provided in subsection (d) of this section. If the Administrator refuses to approve the plan, the Administrator shall state the objections in writing and give the converting savings bank an opportunity to amend the plan to obviate the objections or to appeal the Administrator's decision to the Commission.

(d) After lawful notice to the members of the savings bank and full and fair disclosure, the substance of the plan shall be approved by a majority of the total votes that members of the savings bank are eligible and entitled to cast. The vote by the members may be in person or by proxy. Following the vote of the members, the results of the vote certified by an appropriate officer of the savings bank shall be filed with the Administrator. The Administrator shall then either approve or disapprove the requested conversion. After approval of the conversion, the Administrator shall supervise and monitor the conversion process and shall ensure that the conversion is conducted lawfully and under the savings bank's approved plan of conversion.

(e) Any rules that the Administrator may adopt to govern conversions shall equal or exceed the requirements for conversion, if any, imposed by the federal insurer of deposit accounts. (1991, c. 680, s. 1; 1991 (Reg. Sess., 1992), c. 829, s. 8.)

**Effect of Amendments.** — The 1991 (Reg. Sess., 1992) amendment, effective July 2, 1992, added the language beginning "except that any one or more" in subdivision (c)(6).

## § 54C-47. Conversion to bank.

(a) A State savings bank, upon a majority vote of its board of directors, may apply to the Administrator for permission to convert to a bank, as defined under G.S. 53-1(1), or to a national bank or other form of depository institution and for certification of appropriate amendments to its certificate of incorporation to effect the change. Upon receipt of an application to so convert, the Administrator shall examine all facts connected with the conversion, including receipt of approval of the converting institution's plan of conversion by other federal or state regulatory agencies having jurisdiction over the institution upon completion of its conversion. The depository institution applying for permission to convert shall pay all the expenses and costs of examination.

(b) The converting depository institution shall submit a plan of conversion as a part of the application to the Administrator. The Administrator may approve it with or without amendment. If the Administrator approves the plan, then the plan shall be submitted to the members or stockholders as provided in subsection (c) of this section. If the Administrator refuses to approve the plan, the Administrator's objections shall be stated in writing and the converting depository institution shall be given an opportunity to amend its plan to obviate the objections or to appeal the Administrator's decision to the Commission.

(c) After lawful notice to the members or stockholders of the converting depository institution and full and fair disclosure, the substance of the plan shall be approved by the members or the shareholders at a duly called and properly convened meeting of the members or shareholders. Following the meeting of the members or shareholders, the results of the vote certified by an appropriate officer of the converting depository institution shall be filed with the Administrator. The Administrator shall then either approve or disapprove the requested conversion to a bank, national bank, or other form of depository institution. After approval of the conversion, the Administrator shall supervise and monitor the conversion process and shall ensure that the conversion is conducted lawfully and under the approved plan of conversion. (1993, c. 163, s. 6.)

**Editor's Note.** — Session Laws 1993, c. 163, s. 7 made this section effective October 1, 1993.

## §§ 54C-48 through 54C-51: Reserved for future codification purposes.

## ARTICLE 4.

## *Supervision.*

### § 54C-54. (Effective October 1, 1994 — See editor's note) Examinations by Administrator; report.

(a) It is the Administrator's duty, if at any time the Administrator deems it prudent, to examine and investigate everything relating to the business of a State savings bank or a holding company thereof, and to appoint a suitable and competent person to make the investigation. The investigator shall file with the Administrator a full report of the findings in the case, including any violation of law or any unauthorized or unsafe practices of the savings bank disclosed by the examination.

(b) The Administrator shall furnish a copy of the report to the savings bank examined and may, upon request, furnish a copy of, or excerpts from, the report to the insurer of accounts.

(c) **(Effective October 1, 1994 — See editor's note)** No savings bank may willfully delay or willfully obstruct an examination in any fashion. A person failing to comply with this subsection is guilty of a Class 1 misdemeanor.

(d) **(Effective October 1, 1994 — See editor's note)** No person who possesses or controls any books, accounts, or papers of any State savings bank shall refuse to exhibit same to the Administrator or the Administrator's agent on demand, or shall knowingly or willingly make any false statement in regard to the same. A person failing to comply with this subsection is guilty of a Class 1 misdemeanor. (1991, c. 680, s. 1; 1993, c. 539, ss. 435, 436; 1994, Ex. Sess., c. 24, s. 14(c).)

**Editor's Note.** — Session Laws 1993, c. 539, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

**Effect of Amendments.** — The 1993 amendment, effective October 1, 1994, and applicable to offenses occurring on or after that date, inserted "Class 1" preceding "misdemeanor" in subsections (c) and (d).

## § 54C-62. Statement filed by savings bank; fees.

A State savings bank shall file in the office of the Administrator, on or before the first day of February in each year, in the form prescribed by the Administrator, a statement of the business standing and financial condition of the savings bank on the preceding 31st day of December, signed and sworn to by the secretary or other officer duly authorized by the board of directors of the savings bank before a notary public. The statement shall be accompanied by a filing fee set by the Administrator, subject to the advice and consent of the Commission. The filing fees shall be used to defray the expenses incurred by the Division in supervising State savings banks. (1991, c. 680, s. 1; 1993, c. 163, s. 3.)

**Effect of Amendments.** — The 1993 amendment, effective October 1, 1993, inserted "or other officer duly authorized by the board of directors" following "by the secretary" in the first sentence.

## § 54C-63. Statement examined, approved, and published.

It is the duty of the Administrator to receive and thoroughly examine each annual statement required by G.S. 54C-62, and if made in compliance with the requirements thereof, each State savings bank shall at its own expense, publish an abstract of the same in a newspaper having general circulation within each market area of the savings bank as selected by the managing officer. (1991, c. 680, s. 1; 1991 (Reg. Sess., 1992), c. 829, s. 9; 1993, c. 163, s. 4.)

**Effect of Amendments.** — The 1991 (Reg. Sess., 1992) amendment, effective July 2, 1992, substituted "G.S. 54C-62" for "G.S. 54C-73."

The 1993 amendment, effective October 1, 1993, inserted "at its own expense," following "each State savings bank shall" and substituted "a newspaper having general circulation within each market area of the savings bank as selected by the managing officer" for "one of the newspapers of the State, to be selected by the managing officer making the statement, and at the expense of the savings bank."

## § 54C-64. (Effective October 1, 1994 — See editor's note) Prohibited practices.

A person who engages in any of the following acts or practices is guilty of a Class 1 misdemeanor:

(1) Defamation: Making, publishing, disseminating, or circulating, directly or indirectly, or aiding, abetting, or encouraging the making, publishing, disseminating, or circulat-

ing of any oral, written, or printed statement that is false regarding the financial condition of any savings bank.

(2) False information and advertising: Making, publishing, disseminating, circulating, or otherwise placing before the public in any publication, media, notice, pamphlet, letter, poster, or any other way, an advertisement, announcement, or statement containing any assertion, representation, or statement with respect to the savings bank business or with respect to any person in the conduct of the savings bank business that is untrue, deceptive, or misleading.

(3) Misleading advertising: Use of a name or designation by a savings bank in advertisements, announcements, or statements concerning the savings bank that does not include the words "savings bank" and the designation "SSB" in type that is equally prominent with the other terms in the name or designation of the savings bank. (1991, c. 680, s. 1; 1993, c. 539, s. 437; 1994, Ex. Sess., c. 24, s. 14(c); 1993 (Reg. Sess., 1994), c. 767, s. 22.)

**Editor's Note.** — Session Laws 1993, c. 539, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

Session Laws 1993 (Reg. Sess., 1994), c. 767, which amended this section, in s. 34 provides: "Prosecution for, or sentences based on, offenses occurring before the effective date of this act [October 1, 1994] are not abated or affected by the repeal or amendment in this act of any statute, and the statutes that would be applicable to those prosecutions or sentences but for the provisions of this act remain applicable to those prosecutions or sentences."

**Effect of Amendments.** — The 1993 amendment, effective October 1, 1994, and applicable to offenses occurring on or after that date, inserted "Class 1" preceding "misdemeanor" in the introductory language.

The 1993 (Reg. Sess., 1994) amendment, effective October 1, 1994, deleted "and upon conviction thereof shall be fined or imprisoned, or both, in the discretion of the court" in the introductory language.

## ARTICLE 5.

## *Enforcement.*

### § 54C-78. Civil penalties; directors, officers, and employees.

(a) A person, whether a director, officer, or employee, who is found to have violated this Article, whether willfully or as a result of gross negligence, gross incompetency, or recklessness, may be ordered to pay a civil penalty of up to five thousand dollars ($5,000) per violation. A person who is found to have violated or failed to comply with any cease and desist order issued under the authority of this Article, may be ordered to pay a civil penalty of up to five thousand dollars ($5,000) per violation for each day that the violation or failure to comply continues. All civil penalties, plus interest and cost, that are collected under this subsection shall be deposited into the General Fund of the State treasury.

(b) To enforce this section, the Administrator may assess the penalty, appear in a court of competent jurisdiction, and move the court to order payment of the penalty. Before the assessment of the penalty, the Administrator shall hold a hearing, which shall comply with Article 3A of Chapter 150B of the General Statutes.

(c) Whenever the Administrator determines that an emergency exists that requires immediate corrective action, the Administrator, either before or after instituting any other action or proceeding authorized by this Article, may request the Attorney General to institute a civil action in a court of competent jurisdiction, in the name of the State upon the relation of the Administrator seeking injunctive relief to restrain or enjoin the violation or threatened violation of this Article and for any other and further relief as the court may deem proper. Instituting an action for injunctive relief shall not relieve any party to the proceedings from any civil or criminal penalty prescribed for violation of this Article.

(d) Nothing in this section shall prevent anyone damaged by a director, officer, or employee of a State savings bank from bringing a separate cause of action in a court of competent jurisdiction. (1991, c. 680, s. 1; 1991 (Reg. Sess., 1992), c. 829, s. 10.)

**Effect of Amendments.** — The 1991 (Reg. Sess., 1992) amendment, effective July 2, 1992, in subsection (a) substituted "or failure" for "of failure" in the second sentence, and added the last sentence.

## § 54C-79. (Effective October 1, 1994 — See editor's note) Criminal penalties.

(a) This section shall in no event extend to persons who are found to have acted only with gross negligence, simple negligence, recklessness, or incompetence.

(b) In addition to any of the other penalties or remedies provided by this Article, the following are deemed to be Class 1 misdemeanors:

(1) The willful or knowing violation of this Article by any employee of the Division.

(2) The willful or knowing violation of a cease and desist order that has become final in that no further administrative or judicial appeal is available.

(c) In addition to any of the other penalties or remedies provided by this Article, the willful omission, making, or concurrence in making or publishing a written report, exhibit, or entry in a financial statement on the books of the association, which contains a material statement known to be false is deemed to be a Class 1 misdemeanor. For purposes of this section, "material" shall mean "so substantial and important as to influence a reasonable and prudent businessman or investor."

(d) The Administrator may enforce this section in a court of competent jurisdiction. (1991, c. 680, s. 1; 1993, c. 539, s. 438; 1994, Ex. Sess., c. 24, s. 14(c).)

**Editor's Note.** — Session Laws 1993, c. 539, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

**Effect of Amendments.** — The 1993 amendment, effective October 1, 1994, and applicable to offenses occurring on or after that date, substituted "Class 1 misdemeanors" for "misdemeanors and are punishable as provided in Chapter 14 of the General Statutes" in subsection (b) and "Class 1 misdemeanor" for "misdemeanor and is punishable as provided in Chapter 14 of the General Statutes" in subsection (c).

## ARTICLE 6.

## *Corporate Administration.*

### § 54C-105. Voting rights.

Voting rights in the affairs of a State savings bank may be exercised by members and stockholders by voting either in person or by proxy. (1991, c. 680, s. 1.)

**Editor's Note.** — This section has been set out above to correct an omission in the text of this section as it appears in the main volume.

## ARTICLE 8.

## *Operations.*

### § 54C-170. Minors as deposit account holders.

(a) A savings bank may issue a deposit account to a minor as the sole and absolute owner, or as a joint owner, and receive payments, pay withdrawals, accept pledges and act in any other manner with respect to the account on the order of the minor with like effect as if the minor were of full age and legal capacity. Any payment to a minor is a discharge of the savings bank to the extent thereof. The account shall be held for the exclusive right and benefit of the minor, and any joint owners, free from the control of all persons, except creditors.

(b) A savings bank may lease a safe deposit box to a minor and, with respect to the lease, may deal with the minor in all regards as if the minor were of full age and legal capacity. A minor entering a lease agreement with a savings bank under this subsection is bound by the terms of the agreement to the same extent as if the minor were of full age and legal capacity. (1991, c. 680, s. 1; 1991 (Reg. Sess., 1992), c. 829, s. 11.)

**Effect of Amendments.** — The 1991 (Reg. Sess., 1992) amendment, effective July 2, 1992, in subsection (a), in the first sentence inserted "or as a joint owner" following "absolute owner" and deleted "or as a joint owner" following "accept pledges and act".

## § 54C-179. Forced retirement of deposit accounts.

(a) A savings bank may, at any time that funds are on hand and available for this purpose, force the retirement of and redeem all or any portion of its deposit accounts that have not been pledged as security for loans. A savings bank may not redeem any fixed term deposit accounts that have not matured. The board of directors of the savings bank shall determine the number of and total amount of the deposit accounts to be retired.

(b) A savings bank shall give at least 30 days' notice by certified mail to the last address of each holder of an affected deposit account. The redemption price of deposit accounts so retired is the full withdrawal value of the account, as determined on the last interest date, plus all interest on deposit accounts credited or paid as of the effective retirement date. Interest continues to accrue and be paid or credited by the savings bank to the deposit accounts to be retired through the effective retirement date.

(c) Interest on the deposit accounts called for forced retirement ceases to accrue after the effective retirement date, if the required notice has been given properly, and if on the retirement date the funds necessary for payment have been set aside so as to be available. All rights with respect to those deposit accounts terminate after the effective retirement date, except for the right of the holder of the retired deposit account to receive the full redemption price.

(d) A savings bank shall not redeem deposit accounts by forced retirement whenever it has on file applications for withdrawal or maturities that have not yet been acted upon and paid. (1991 (Reg. Sess., 1992), c. 829, s. 12.)

**Editor's Note.** — Session Laws 1991 (Reg. Sess., 1992), c. 829, s. 13 made this section effective upon ratification. The act was ratified July 2, 1992.

## §§ 54C-180 through 54C-194: Reserved for future codification purposes.

## Article 9.

## *Holding Companies.*

## §§ 54C-197, 54C-198: Reserved for future codification purposes.

## ARTICLE 10.

## *Savings Bank Interstate Branches.*

### § 54C-199. Title.

This Article shall be known and may be cited as the North Carolina Savings Bank Interstate Branch Act. (1993, c. 191, s. 3.)

**Editor's Note.** — Session Laws 1993, c. 191, s. 4 made this Article effective October 1, 1993.

### § 54C-200. Definitions.

As used in this Article, unless the context clearly requires otherwise, the following definitions apply:

(1) "Administrator" means the Administrator of the Savings Institution Division.

(2) "Branch" means a full service office of a savings bank through which it renders a savings bank service other than its principal office. A savings bank may engage in any authorized function or service through an authorized branch office.

(3) "Commission" means the North Carolina Savings Institution Commission.

(4) "Home state" means (i) as to a state-chartered savings bank, the state which granted the savings bank its charter, and (ii) as to a federal savings bank, the state in which the savings bank has its principal office.

(5) "Out-of-state" savings bank means a savings bank granted a charter by any state other than this State and whose principal office is not located in this State.

(6) "Savings bank" means a state savings bank or a federal savings bank, unless limited by use of the words "State" or "federal".

(7) "State savings bank" means a depository institution chartered under the laws of this State.

(8) "Supervisor" means the state savings bank supervisor or equivalent state official having primary regulatory authority over an out-of-state savings bank. (1993, c. 191, s. 3.)

### § 54C-201. Establishment of branches by out-of-state savings banks.

Any out-of-state savings bank that meets the requirements of this Article may establish a branch within North Carolina either by (i) *de novo* entry; (ii) the purchase of an existing branch; (iii) the purchase of all or substantially all of the assets of a State savings bank located in North Carolina; or (iv) merger or consolidation. (1993, c. 191, s. 3.)

## § 54C-202. Application requirements.

(a) Any out-of-state savings bank desiring to establish a branch office under this Article shall file with the Administrator a written application meeting the following requirements:

(1) The out-of-state savings bank shall agree to comply with all the applicable rules and regulations, and informational filing requirements contained in the laws and rules of this State that would apply to a State savings bank engaging in an equivalent form of transaction. Additionally, the Administrator shall apply the same standards of approval to the application of the out-of-state savings bank as would apply to an application by a State savings bank for an equivalent form of transaction.

(2) The out-of-state savings bank shall provide the Administrator, in the manner prescribed by the Administrator, with such additional information as the Administrator deems necessary, to fully evaluate the application.

(3) The out-of-state savings bank shall pay an application fee established by the Administrator pursuant to G.S. 54C-9.

(4) The out-of-state savings bank shall not commence operations of the branch office until it has received the written approval of the Administrator.

(b) The Administrator shall act on the application within 90 days of receipt of the completed application. (1993, c. 191, s. 3.)

## § 54C-203. Conditions for approval.

No application by an out-of-state savings bank received under this Article may be finally approved by the Administrator unless:

(1) The Administrator has received in writing approval of the proposed transaction from the supervisor of the out-of-state savings bank;

(2) The supervisor of the out-of-state savings bank agrees in writing to share with the Administrator examination reports prepared by the supervisor and any other information deemed necessary by the Administrator regarding the out-of-state savings bank;

(3) The out-of-state savings bank agrees in writing to make available to the Administrator all information that may be required to effectively examine the savings bank;

(4) The out-of-state savings bank agrees in writing that so long as it maintains a branch in North Carolina, it will meet the conditions set forth in this Article and comply with all applicable North Carolina laws and any rules issued thereunder, as well as any orders or directives issued to the savings bank by the Administrator;

(5) The home state of the out-of-state savings bank permits savings banks chartered under the laws of this State to establish branches within its border; and

(6) The out-of-state savings bank designates and files with the Office of the Secretary of State a document appointing an agent in this State to receive service of judicial process. (1993, c. 191, s. 3.)

## § 54C-204. Special conditions.

(a) The Administrator may require an out-of-state savings bank to designate one of its branches in North Carolina as a "headquarters branch" and may, by rule, require that reports, books, and records required of savings banks doing business under this Article be available at the designated headquarters branch.

(b) Once an out-of-state savings bank has established at least one branch in North Carolina pursuant to this Article, subsequent applications to establish additional branches shall be considered on the same basis as an application of a State savings bank to establish an additional branch pursuant to G.S. 54C-23.

(c) If an out-of-state savings bank establishes a branch or branches by merger with or purchase from a savings bank located in this State, and the out-of-state savings bank and the savings bank located in this State are both owned by the same holding company, any conditions, limitations, or restrictions placed on the holding company, pursuant to Article 9 of this Chapter, shall continue to apply to both the acquiring out-of-state savings bank and its holding company. (1993, c. 191, s. 3.)

## § 54C-205. Powers.

An out-of-state savings bank that establishes a branch in North Carolina may engage in all the activities authorized by North Carolina law for a State savings bank except to the extent that such activities have been expressly prohibited by the state supervisor of the out-of-state savings bank or the laws of the out-of-state savings bank's home state. (1993, c. 191, s. 3.)

## § 54C-206. Establishment of out-of-state branches by State savings banks.

With the prior consent of the Administrator, any savings bank chartered under the laws of North Carolina may establish a branch in any other state in accordance with the laws of such other state. (1993, c. 191, s. 3.)

## § 54C-207. Regulatory and supervisory oversight.

(a) The Administrator may enter into such agreements as necessary regarding the scope, timing, coordination, and frequency of examinations and other supervisory matters, including the sharing of information gathered in such examinations, with other supervisors and federal savings bank regulators. This authority applies to both out-of-state savings banks and their holding companies.

(b) The Administrator may require periodic reports on the financial condition of any out-of-state savings bank or its holding company that maintains a branch within North Carolina and may from time to time require from any such out-of-state savings banks other reports under oath in such scope and detail as the Administrator may reasonably determine to be necessary for the purpose of assuring continuing compliance with the provisions of this Article.

(c) The Administrator may, if necessary, conduct full-scope, onsite examinations of any branch established pursuant to this Article.

(d) Out-of-state savings banks shall be assessed and required to pay supervisory and examination fees in accordance with G.S. 54C-55 and the rules issued thereunder. (1993, c. 191, s. 3.)

## § 54C-208. Enforcement.

(a) Any enforcement authority available to the Administrator for use against a State savings bank may, subject to the provisions of Chapter 150B of the General Statutes, be used against a branch established under this Article and against the out-of-state savings bank or its parent holding company establishing such branch.

(b) The Administrator may suspend or revoke the authority of an out-of-state savings bank to establish or maintain a branch in North Carolina upon a finding of fact or condition or circumstance that is grounds for denial of an application to establish and maintain a branch under this Article.

(c) The Administrator may enforce the provisions of this Article through an action in any court of North Carolina or any other state or any court of the United States as provided in G.S. 54C-76, 54C-77, 54C-78, and 54C-79 for the purpose of obtaining an appropriate remedy for violation of any provisions of this Article.

(d) The Administrator may enter into joint actions with other supervisors or federal savings banking regulators, or both, having concurrent jurisdiction over any out-of-state savings bank that has a branch in North Carolina or over any State savings bank that has a branch in another state, or may take such action independently to carry out the Administrator's responsibilities under this Article and assure compliance with the provisions of this Article and the applicable savings banking laws of this State. (1993, c. 191, s. 3.)

## § 54C-209. Branch closings.

An out-of-state savings bank that is subject to an order or written agreement revoking its authority to establish or maintain a branch in North Carolina and any State savings bank that is subject to an order or written agreement revoking its authority to establish or maintain a branch in another state shall wind up the business of that branch in an orderly manner that protects the depositors, customers, and creditors of the branch, and that complies with all North Carolina laws and all other applicable laws regarding the closing of the branch. (1993, c. 191, s. 3.)

## § 54C-210. Rules.

The Commission may adopt rules as necessary to carry out the provisions of this Article. (1993, c. 191, s. 3.)

## § 54C-211. Appeal of Administrator's decision.

Any aggrieved party in a proceeding under this Article may, within 30 days after final decision of the Administrator, appeal such decision to the Commission. The Commission, within 30 days of receipt of the notice of appeal, shall approve, disapprove, or modify the Administrator's decision. Failure of the Commission to act within 30 days of receipt of notice of appeal shall constitute a final decision of the Commission approving the decision of the Administrator. Notwithstanding any other provision of law, any aggrieved party to a decision of the Commission shall be entitled to an appeal pursuant to G.S. 54C-16. (1993, c. 191, s. 3.)

### § 54C-212. Severability.

If any provision of this Article or the application of such provision to any persons or circumstances is found invalid, the remainder of this Article and its application to persons or circumstances other than those as to which it is held invalid, shall not be affected. (1993, c. 191, s. 3.)

# Chapter 55.

# North Carolina Business Corporation Act.

## Article 1.

## General Provisions.

### Part 2. Filing Documents.

Sec.
55-1-20. Filing requirements.
55-1-22. Filing, service, and copying fees.
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**Editor's Note.** — The amendments to the North Carolina Comments set out in this Supplement reflect either errors discovered in the comments as originally drafted or technical amendments enacted in 1990 to the new North Carolina Business Corporation Act.

# ARTICLE 1.

# *General Provisions.*

## Part 1. Short Title and Reservation of Power.

### § 55-1-01. Short title.

**Editor's Note. —** Session Laws 1989, c. 265, s. 3, which is noted under this section in the main volume, as amended by Session Laws 1989 (Reg. Sess., 1990), c. 1066, s. 32(a), made this Chapter effective July 1, 1990, except for § 55-16-22, which became effective January 1, 1991.

**Legal Periodicals. —** For article, "The Uncertain Case Against the Double Taxation of Corporate Income," see 68 N.C.L. Rev. (1990).

For business symposium, "Management Buyouts: Strategies, Ethics and Other Considerations," see 25 Wake Forest Law Rev. 1 (1990).

For article discussing changes in theories of the corporation over the last 150 years, see "Theories of the Corporation," 1990 Duke L.J. 201.

For article, "The Corporate Persona, Contract (and Market) Failure, and Moral Values," see 69 N.C.L. Rev. 273 (1991).

For article, "Discrimination, Managerial Discretion and the Corporate Contract," see 26 Wake Forest L. Rev. 541 (1991).

## Part 2. Filing Documents.

### § 55-1-20. Filing requirements.

(a) To be entitled to filing by the Secretary of State under this Chapter, a document must satisfy the requirements of this section, and of any other section that adds to or varies these requirements.

(b) The document must be one that is required or permitted by this Chapter to be filed in the office of the Secretary of State.

(c) The document must contain the information required by this Chapter. It may contain other information as well.

(d) The document must be typewritten or printed.

(e) The document must be in the English language.

A corporate name need not be in English if written in English letters or Arabic or Roman numerals, and the certificate of existence required of foreign corporations need not be in English if accompanied by a reasonably authenticated English translation.

(f) The document must be executed:

(1) By the chairman of the board of directors of a domestic or foreign corporation, by its president, or by another of its officers;

(2) If directors have not been selected or the corporation has not been formed, by an incorporator; or

(3) If the corporation is in the hands of a receiver, trustee, or other court-appointed fiduciary, by that fiduciary.

(g) The person executing the document shall sign it and state beneath or opposite his signature his name and the capacity in which he signs. The document may but need not contain:

(1) The corporate seal;

(2) An attestation by the secretary or an assistant secretary; and

(3) An acknowledgement, verification, or proof.

(h) If the Secretary of State has prescribed a mandatory form for the document under G.S. 55-1-21, the document must be in or on the prescribed form.

(i) The document must be delivered to the office of the Secretary of State for filing and must be accompanied by one exact or conformed copy (except as provided in G.S. 55-5-03 and G.S. 55-15-09), and all fees required by this Chapter.

(j) Any signature on any document authorized to be filed with the Secretary of State under any provision of this Chapter may be a facsimile. (1955, c. 1371, s. 1; 1967, c. 13, s. 1; c. 823, s. 16; 1989, c. 265, s. 1; 1989 (Reg. Sess., 1990), c. 1024, s. 12.1(a); 1991, c. 645, s. 15.)

**Effect of Amendments.** — The 1989 (Reg. Sess., 1990) amendment, effective July 1, 1990, in subsection (i) deleted "and taxes" preceding "required by this Chapter" at the end of the subsection.

The 1991 amendment, effective October 1, 1991, added subsection (j).

## § 55-1-22. Filing, service, and copying fees.

(a) The Secretary of State shall collect the following fees when the documents described in this subsection are delivered to him for filing:

| | Document | Fee |
|---|---|---|
| (1) | Articles of incorporation | $100.00 |
| (2) | Application for reserved name | 10.00 |
| (3) | Notice of transfer of reserved name | 10.00 |
| (4) | Application for registered name | 10.00 |
| (5) | Application for renewal of registered name | 10.00 |
| (6) | Corporation's statement of change of registered agent or registered office or both | 5.00 |
| (7) | Agent's statement of change of registered office for each affected corporation | 5.00 |
| (8) | Agent's statement of resignation | No fee |
| (9) | Designation of registered agent or registered office or both | 5.00 |
| (10) | Amendment of articles of incorporation | 50.00 |
| (11) | Restated articles of incorporation | 10.00 |
| | with amendment of articles | 50.00 |
| (12) | Articles of merger or share exchange | 50.00 |
| (13) | Articles of dissolution | 30.00 |
| (14) | Articles of revocation of dissolution | 10.00 |
| (15) | Certificate of administrative dissolution | No fee |
| (16) | Application for reinstatement following administrative dissolution | 25.00 |
| (17) | Certificate of reinstatement | No fee |
| (18) | Certificate of judicial dissolution | No fee |
| (19) | Application for certificate of authority | 200.00 |
| (20) | Application for amended certificate of authority | 50.00 |
| (21) | Application for certificate of withdrawal | 10.00 |
| (22) | Certificate of revocation of authority to transact business | No fee |
| (23) | Annual report | 10.00 |
| (24) | Articles of correction | 10.00 |

| Document | Fee |
|---|---|
| (25) Application for certificate of existence or authorization | 5.00 |
| (26) Any other document required or permitted to be filed by this Chapter | 10.00. |

(b) The Secretary of State shall collect a fee of ten dollars ($10.00) each time process is served on him under this Chapter. The party to a proceeding causing service of process is entitled to recover this fee as costs if he prevails in the proceeding.

(c) The Secretary of State shall collect the following fees for copying, comparing, and certifying a copy of any filed document relating to a domestic or foreign corporation:

(1) One dollar ($1.00) a page for copying or comparing a copy to the original; and

(2) Five dollars ($5.00) for the certificate. (1957, c. 1180; 1967, c. 823, s. 20; 1969, c. 751, ss. 42, 43, 45; c. 797, ss. 4, 5; 1975, 2nd Sess., c. 981, s. 1; 1983, c. 713, ss. 32-38; 1989, c. 265, s. 1; c. 714; 1989 (Reg. Sess., 1990), c. 1057; 1991, c. 574, s. 1.)

**Effect of Amendments.** — The 1989 (Reg. Sess., 1990) amendment, effective January 1, 1991, changed the fee with regard to subdivision (a)(23) "Annual report" from $5.00 to $10.00.

The 1991 amendment, effective July 8, 1991, in subsection (c), in the introductory language, inserted "comparing" and substituted "a copy" for "the copy", and in subdivision (1), substituted "One dollar ($1.00)" for "Fifty-cents ($.50)", and inserted "or comparing a copy to the original."

## § 55-1-23. Effective time and date of document.

(a) Except as provided in subsection (b) and G.S. 55-1-24(c), a document accepted for filing is effective:

(1) At the time of filing on the date it is filed, as evidenced by the Secretary of State's date and time endorsement on the original document; or

(2) At the time specified in the document as its effective time on the date it is filed.

(b) A document may specify a delayed effective time and date, and if it does so the document becomes effective at the time and date specified. If a delayed effective date but no time is specified, the document is effective at 11:59:59 P.M. on that date. A delayed effective date for a document may not be later than the 90th day after the date it is filed.

(c) Except as provided in G.S. 55-2-03(b), the fact that a document has become effective under this section does not determine its validity or invalidity or the correctness or incorrectness of the information contained in the document. (1955, c. 1371, s. 1; 1967, c. 13, s. 1; c. 823, s. 16; 1989, c. 265, s. 1; 1993, c. 552, s. 1.)

**Effect of Amendments.** — The 1993 amendment, effective October 1, 1993, in subsection (c) substituted "Except as provided in G.S. 55-2-03(b), the" for "The".

## § 55-1-25. Filing duty of Secretary of State.

(a) If a document delivered to the office of the Secretary of State for filing satisfies the requirements of this Chapter, the Secretary of State shall file it.

(b) The Secretary of State files a document by stamping or otherwise endorsing "Filed", together with his name and official title and the date and time of filing, on both the original and the document copy. After filing a document, except as provided in G.S. 55-5-03 and G.S. 55-15-09, the Secretary of State shall deliver the document copy to the domestic or foreign corporation or its representative.

(c) If the Secretary of State refuses to file a document, he shall return it, by personal delivery or by first-class mail postage prepaid, to the domestic or foreign corporation or its representative within five days after the document was received, together with a brief, written statement of the date and the reason for his refusal.

(d) The Secretary of State's duty is to review and file documents that satisfy the requirements of this Chapter. His filing or refusing to file a document does not:

(1) Except as provided in G.S. 55-2-03(b), affect the validity or invalidity of the document in whole or part;

(2) Relate to the correctness or incorrectness of information contained in the document;

(3) Create a presumption that the document is valid or invalid or that information contained in the document is correct or incorrect. (1955, c. 1371, s. 1; 1967, c. 13, s. 1; c. 823, s. 16; 1989, c. 265, s. 1; 1989 (Reg. Sess., 1990), c. 1024, s. 12.2; 1993, c. 552, s. 2.)

**Effect of Amendments.** — The 1989 (Reg. Sess., 1990) amendment, effective July 1, 1990, substituted "G.S. 55-15-09" for "G.S. 55-15-10" in the second sentence of subsection (b).

The 1993 amendment, effective October 1, 1993, in subsection (c) inserted "by personal delivery or by first-class mail postage prepaid" and substituted "statement of the date and" for "explanation of"; and in subsection (d) substituted "Except as provided in G.S. 55-2-03(b), affect" for "Affect".

## § 55-1-26. Appeal from Secretary of State's refusal to file document.

(a) If the Secretary of State refuses to file a document delivered to his office for filing, the person tendering the document for filing may, within 30 days after such refusal, appeal the refusal to the Superior Court of Wake County. The appeal is commenced by filing a petition with the court and with the Secretary of State requesting the court to compel the Secretary of State to file the document. The petition shall have attached to it the document to be filed and the Secretary of State's explanation for his refusal to file. The appeal to the superior court is not governed by the Administrative Procedure Act and shall be determined upon such further notice and opportunity to be heard, if any, as the court may deem appropriate under the circumstances.

(b) Upon consideration of the petition and any response made by the Secretary of State, the court may, prior to entering final judgment, order the Secretary of State to file the document or take other action the court considers appropriate.

(c) The court's final decision may be appealed as in other civil proceedings. (1989, c. 265, s. 1; 1989 (Reg. Sess., 1990), c. 1024, s. 12.3.)

### AMENDED NORTH CAROLINA COMMENTARY

The prior law contained no explicit procedure for appeal from the Secretary of State's refusal to file a document.

This section varies from the Model Act in that it avoids use of the word "summarily" and instead sets out a specific procedure, in the nature of a petition for a writ of mandamus, which (1) requires the appellant to file a copy of its petition with the Secretary of State, (2) makes it clear that the Administrative Procedure Act does not govern such appeal, and (3) provides that the court may give the Secretary of State further notice and an opportunity to be heard if it chooses to do so. In addition, to clarify that a refusal to file initial articles of incorporation or reservations of corporate names may be appealed pursuant to this section, this section uses the words "person tendering the document for filing" to describe the appellant where the Model Act uses the words "domestic or foreign corporation."

**Effect of Amendments.** — The 1989 (Reg. Sess., 1990) amendment, effective July 1, 1990, substituted "person tendering the document for filing" for "domestic or foreign corporation" in the first sentence of subsection (a).

## § 55-1-28. Certificate of existence.

(a) Anyone may apply to the Secretary of State to furnish a certificate of existence for a domestic corporation or a certificate of authorization for a foreign corporation.

(b) A certificate of existence or authorization sets forth:

(1) The domestic corporation's corporate name or the foreign corporation's corporate name used in this State;

(2) That (i) the domestic corporation is duly incorporated under the law of this State, the date of its incorporation, and the period of its duration if less than perpetual; or (ii) that the foreign corporation is authorized to transact business in this State;

(3) That the articles of incorporation of a domestic corporation or the certificate of authority of a foreign corporation has not been suspended for failure to comply with the Revenue Act of this State and that the corporation has not been administratively dissolved for failure to comply with the provisions of this Chapter;

(4) That its most recent annual report required by G.S. 55-16-22 has been delivered to the Secretary of State;

(5) That articles of dissolution have not been filed; and

(6) Other facts of record in the office of the Secretary of State that may be requested by the applicant.

(c) Subject to any qualification stated in the certificate, a certificate of existence or authorization issued by the Secretary of State may be relied upon as conclusive evidence that the domestic or foreign corporation is in existence or is authorized to transact business in this State. (1955, c. 1371, s. 1; 1989, c. 265, s. 1; 1991, c. 645, s. 1.)

**Effect of Amendments.** — The 1991 amendment, effective October 1, 1991, rewrote subdivision (b)(3).

## § 55-1-29. Penalty for signing false document.

(a) A person commits an offense if he signs a document he knows is false in any material respect with intent that the document be delivered to the Secretary of State for filing.

(b) **(Effective October 1, 1994 — See editor's note)** An offense under this section is a Class 1 misdemeanor. (1989, c. 265, s. 1; 1993, c. 539, s. 439; 1994, Ex. Sess., c. 24, s. 14(c).)

**Editor's Note.** — Session Laws 1993, c. 539, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

**Effect of Amendments.** — The 1993 amendment, effective October 1, 1994, and applicable to offenses occurring on or after that date, inserted "Class 1" preceding "misdemeanor" in subsection (b).

## Part 3. Secretary of State.

## § 55-1-32. Penalties imposed upon corporations, officers, and directors for failure to answer interrogatories.

(a) The knowing failure or refusal of a domestic or foreign corporation to answer truthfully and fully within the time prescribed in this Chapter interrogatories propounded by the Secretary of State in accordance with the provisions of this Chapter shall constitute grounds for administrative dissolution under G.S. 55-14-20 or for revocation under G.S. 55-15-30, as the case may be.

(b) **(Effective October 1, 1994 — See editor's note)** Each officer and director of a domestic or foreign corporation who knowingly fails or refuses within the time prescribed by this Chapter to answer truthfully and fully interrogatories propounded to him by the Secretary of State in accordance with the provisions of this Chapter shall be guilty of a Class 1 misdemeanor. (1955, c. 1371, s. 1; 1989, c. 265, s. 1; 1993, c. 539, s. 440; c. 552, s. 3; 1994, Ex. Sess., c. 24, s. 14(c).)

**Editor's Note.** — Session Laws 1993, c. 539, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

**Effect of Amendments.** — Session Laws 1993, c. 552, s. 3, effective October 1, 1993, in subsection (a) substituted "The knowing failure or refusal of a domestic or foreign corporation" for "If a corporation, domestic or foreign, fails or refuses" and substituted "Chapter shall constitute grounds for administrative dissolution under G.S. 55-14-20 or for revocation under G.S. 55-15-30, as the case may be" for "Chapter, the Secretary of State may suspend its articles of incorporation or its certificate of authority to do business"; and in subsection (b) substituted "domestic or foreign corporation who knowingly" for "corporation, domestic or foreign, who".

Session Laws 1993, c. 539, s. 440, effective October 1, 1994, and applicable to offenses occurring on or after that date, inserted "Class 1" preceding "misdemeanor" in subsection (b).

## Part 4. Definitions.

### § 55-1-40. Chapter definitions.

In this Chapter unless otherwise specifically provided:

(1) "Articles of incorporation" include amended and restated articles of incorporation and articles of merger.

(2) "Authorized shares" means the shares of all classes a domestic or foreign corporation is authorized to issue.

(3) "Conspicuous" means so written that a reasonable person against whom the writing is to operate should have noticed it. For example, printing in italics or boldface or contrasting color, or typing in capitals or underlined, is conspicuous.

(4) "Corporation" or "domestic corporation" means a corporation for profit or a corporation having capital stock that is incorporated under or subject to the provisions of this Chapter and that is not a foreign corporation except that in G.S. 55-9-01 and G.S. 55-15-21 "corporation" includes domestic and foreign corporations.

(5) "Deliver" includes mail.

(6) "Distribution" means a direct or indirect transfer of money or other property (except its own shares) or incurrence of indebtedness by a corporation to or for the benefit of its shareholders in respect of any of its shares. A distribution may be in the form of a declaration or payment of a dividend; a purchase, redemption, or other acquisition of shares; a distribution of indebtedness; or otherwise.

(6a) "Dividend credit" as used in G.S. 55-6-01(d)(5) means the aggregate of all yearly dividend credits. "Yearly dividend credit" means with respect to noncumulative preferred shares, the amount by which the full dividend preference of such a share, to the extent that such preference is earned by the corporation with respect to such a share in a particular fiscal year, exceeds the dividends paid on said share for that year; provided, that no dividend credit shall accrue unless, and only to the extent that, there exists an earned surplus at the end of such fiscal year. Computations of earnings allocable to classes of shares made in good faith by the board of directors in accordance with generally accepted accounting principles shall be conclusive. For the purpose of this definition, a dividend is deemed paid if it has been declared and funds for its payment have been set aside.

(7) "Effective date of notice" is defined in G.S. 55-1-41.

(8) Reserved for future codification purposes.

(9) "Entity" includes (without limiting the meaning of such term in Article 9) corporation and foreign corporation; non-

profit corporation; professional corporation; profit and nonprofit unincorporated association; business trust, estate, partnership, trust, and two or more persons having a joint or common economic interest; and state, United States, and foreign government.

(10) "Foreign corporation" means a corporation for profit incorporated under a law other than the law of this State.

(11) "Governmental subdivision" includes authority, county, district, and municipality.

(12) "Includes" means a partial definition.

(13) "Individual" denotes a natural person legally competent to act and also includes the estate of an incompetent or deceased individual.

(13a) An item is "mailed" when it is deposited in the United States mail with postage thereon prepaid and correctly addressed. When a corporation mails an item to a shareholder, "correctly addressed" means addressed to the shareholder's address as shown in the corporation's current record of shareholders.

(14) "Means" denotes an exhaustive definition.

(14a) "Merger" as used in Article 9 includes a "share exchange" as used in Article 11.

(15) "Notice" includes demand and is defined in G.S. 55-1-41.

(16) "Person" includes individual and entity.

(17) "Principal office" means the office (in or out of this State) so designated in the annual report where the principal executive offices of a domestic or foreign corporation are located.

(18) "Proceeding" includes civil suit and criminal, administrative, and investigatory action.

(18a) "Public corporation" means any corporation that has a class of shares registered under Section 12 of the Securities Exchange Act of 1934, as amended (15 U.S.C. § 78*l*).

(19) "Record date" means the date established under Article 6 or 7 on which a corporation determines the identity of its shareholders for purposes of this Chapter.

(20) "Secretary" means the corporate officer to whom the board of directors has delegated responsibility under G.S. 55-8-40(c) for custody of the minutes of the meetings of the board of directors and of the shareholders and for authenticating records of the corporation.

(21) "Shares" means the units into which the proprietary interests in a corporation are divided.

(22) "Shareholder" means the person in whose name shares are registered in the records of a corporation or the beneficial owner of shares to the extent of the rights granted by a nominee certificate on file with a corporation.

(23) "State", when referring to a part of the United States, includes a state and commonwealth (and their agencies and governmental subdivisions) and a territory and insular possession (and their agencies and governmental subdivisions) of the United States.

(24) "Subscriber" means a person who subscribes for shares in a corporation, whether before or after incorporation.

(25) "United States" includes district, authority, bureau, commission, department, and any other agency of the United States.

(26) "Voting group" means all shares of one or more classes or series that under the articles of incorporation or this Chapter are entitled to vote and be counted together collectively on a matter at a meeting of shareholders. All shares entitled by the articles of incorporation or this Chapter to vote generally on the matter are for that purpose a single voting group. (1955, c. 1371, s. 1; 1959, c. 1316, s. 1; 1989, c. 265, s. 1; 1989 (Reg. Sess., 1990), c. 1024, s. 12.4; 1993, c. 552, s. 4.)

## AMENDED NORTH CAROLINA COMMENTARY

This section defines more terms than were defined in former G.S. 55-2 and in some cases the definitions are different. The following differences should be noted:

(i) For the sake of uniformity with other states, this Act does not use the term "charter," but instead defines "articles of incorporation" to include all amendments.

(ii) This section does not contain general definitions of the terms "assets," "dominant shareholder," "liabilities," "net assets," or "preferred share," as did prior law, because such terms have no special significance in the Model Act.

This section differs from the Model Act in certain respects:

(i) The phrase "unless otherwise specifically provided" was added to the introduction to allow for different definitions in Article 9.

(ii) Except for the final clause thereof, the definition of "corporation" was brought forward with minor modifications from prior law. The final clause, relating to the use of the term "corporation" in G.S. 55-9-01, was considered necessary because that section, which was brought forward from prior law, uses the term "corporation" in certain cases to refer to any corporation, foreign or domestic. In the remainder of Article 9, the term "corporation" refers to domestic corporations only.

(iii) The definition of "dividend credit" was brought forward with minor modifications from prior law.

(iv) The Model Act's definition of "employee" was deleted as unnecessary and undesirable.

(v) The Model Act's definition of "entity" was expanded to include professional corporations.

(vi) "Means" was substituted for "denotes" in the definition of "includes."

(vii) The definition of "individual" was expanded.

(viii) Definitions were included for "mail" and "merger" to clarify possible confusion in the use of those terms.

(ix) "Notice" was defined to include "demand."

(x) A definition of "public corporation" was added for ease of reference in those provisions of the Act that are applicable only to corporations having a class of shares registered under the Securities Exchange Act of 1934.

The Model Act uses the term "not-for-profit corporation" rather than the term "nonprofit corporation," which is used in this Act. The terms "not-for-profit corporation" and "nonprofit corporation" are interchangeable in Chapter 55A. "Nonprofit corporation" and "nonprofit association" were therefore used throughout this Act.

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**Effect of Amendments.** — The 1989 (Reg. Sess., 1990) amendment, effective July 1, 1990, deleted "or a corporation having capital" following "corporation for profit" in subsection (10).

The 1993 amendment, effective October 1, 1993, in subdivision (4) inserted "and G.S. 55-15-21".

### CASE NOTES

**Quoted** in Parsons v. Jefferson-Pilot Corp., 106 N.C. App. 307, 416 S.E.2d 914 (1992).

## § 55-1-41. Notice.

(a) Notice under this Chapter shall be in writing unless oral notice is authorized in the corporation's articles of incorporation or bylaws and written notice is not specifically required by this Chapter.

(b) Notice may be communicated in person; by telephone, telegraph, teletype, or other form of wire or wireless communication, or by facsimile transmission; or by mail or private carrier. If these forms of personal notice are impracticable as to one or more persons, notice may be communicated to such persons by publishing notice in a newspaper in the county wherein the corporation has its principal place of business in the State, or if it has no principal place of business in the State, the county wherein it has its registered office; or by radio, television, or other form of public broadcast communication.

(c) Written notice by a domestic or foreign corporation to its shareholder is effective when deposited in the United States mail with postage thereon prepaid and correctly addressed to the shareholder's address shown in the corporation's current record of shareholders.

(d) Written notice to a domestic or foreign corporation (authorized to transact business in this State) may be addressed to its registered agent at its registered office or to the corporation or its secretary at its principal office shown in its most recent annual report on file in the office of the Secretary of State or, in the case of a foreign corporation that has not yet delivered an annual report, in its application for a certificate of authority.

(e) Except as provided in subsection (c), written notice is effective at the earliest of the following:

(1) When received;

(2) Five days after its deposit in the United States mail, as evidenced by the postmark or otherwise, if mailed with at least first-class postage thereon prepaid and correctly addressed;

(3) On the date shown on the return receipt, if sent by registered or certified mail, return receipt requested, and the receipt is signed by or on behalf of the addressee.

(f) Oral notice is effective when actually communicated to the person entitled thereto.

(g) If this Chapter prescribes notice requirements for particular circumstances, those requirements govern. If articles of incorporation or bylaws prescribe notice requirements not inconsistent with this section or other provisions of this Chapter, those requirements govern. (1989, c. 265, s. 1; 1993, c. 552, s. 5.)

**Effect of Amendments.** — The 1993 amendment, effective October 1, 1993, in subsection (a) added at the end "and written notice is not specifically required by this Chapter" and in subdivision (e)(2) inserted "or otherwise" and inserted "at least first-class".

### CASE NOTES

**Cited** in Nissan Div. of Nissan Motor Corp. in United States v. Nissan, 111 N.C. App. 748, 434 S.E.2d 224 (1993).

## ARTICLE 2.

## *Incorporation.*

### § 55-2-02. Articles of incorporation.

(a) The articles of incorporation must set forth:

(1) A corporate name for the corporation that satisfies the requirements of G.S. 55-4-01;

(2) The number of shares the corporation is authorized to issue and any other information required by G.S. 55-6-01;

(3) The street address, and the mailing address if different from the street address, of the corporation's initial registered office, the county in which the initial registered office is located, and the name of the corporation's initial registered agent at that address; and

(4) The name and address of each incorporator.

(b) The articles of incorporation may set forth any provision that under this Chapter is required or permitted to be set forth in the bylaws, and may also set forth:

(1) The names and addresses of the individuals who are to serve as the initial directors;

(2) Provisions not inconsistent with law regarding (i) the purpose or purposes for which the corporation is organized; (ii) managing the business and regulating the affairs of the corporation; (iii) defining, limiting, and regulating the powers of the corporation, its board of directors, and shareholders; (iv) a par value for authorized shares or classes of shares; (v) the imposition of personal liability on shareholders for the debts of the corporation to a specified extent and upon specified conditions; (vi) any limitation on the duration of the corporation; and

(3) A provision limiting or eliminating the personal liability of any director arising out of an action whether by or in the right of the corporation or otherwise for monetary damages for breach of any duty as a director. No such provision shall be effective with respect to (i) acts or omissions that the director at the time of such breach knew or believed were clearly in conflict with the best interests of the corporation, (ii) any liability under G.S. 55-8-33, (iii) any transaction from which the director derived an improper personal benefit, or (iv) acts or omissions occurring prior to the date the provisions became effective. As used herein, the term "improper personal benefit" does not include a director's reasonable compensation or other reasonable incidental benefit for or on account of his service as a director, officer, employee, independent contractor, attorney, or consultant of the corporation. A provision permitted by this Chapter in the articles of incorporation, bylaws, or a contract or resolution indemnifying or agreeing to indem-

nify a director against personal liability shall be fully effective whether or not there is a provision in the articles of incorporation limiting or eliminating personal liability.

(c) The articles of incorporation need not set forth any of the corporate powers enumerated in this Chapter. (Code, s. 677; 1885, c. 19; 1889, c. 170; 1891, c. 257; 1893, c. 244; 1901, c. 2, s. 8; c. 47; 1903, c. 453; Rev., s. 1137; 1911, c. 213, s. 1; 1913, c. 5, s. 1; C.S., s. 1114; Ex. Sess. 1920, c. 55; 1924, c. 98; 1935, cc. 166, 320; 1939, c. 222; G.S., s. 55-2; 1951, c. 265, s. 1; 1955, c. 1371, s. 1; 1957, c. 979, s. 5; 1959, c. 1316, s. 1½; 1969, c. 751, s. 2; 1973, c. 469, s. 2; 1987, c. 626, s. 1; 1989, c. 265, s. 1; 1993, c. 552, s. 6.)

**Effect of Amendments.** — The 1993 amendment, effective October 1, 1993, in the first sentence of subdivision (b)(3) substituted "any director" for "each director".

**Legal Periodicals.** —

For article, "The Corporate Persona, Contract (and Market) Failure, and Moral Values," see 69 N.C.L. Rev. 273 (1991).

## § 55-2-03. Incorporation.

### CASE NOTES

**Stated** in Statesville Stained Glass, Inc. v. T.E. Lane Constr. & Supply Co., 110 N.C. App. 592, 430 S.E.2d 437 (1993).

## ARTICLE 3.

## *Purposes and Powers.*

## § 55-3-02. General powers.

(a) Unless its articles of incorporation or this Chapter provide otherwise, every corporation has perpetual duration and succession in its corporate name and has the same powers as an individual to do all things necessary or convenient to carry out its business and affairs, including without limitation power:

(1) To sue and be sued, complain and defend in its corporate name;

(2) To have a corporate seal, which may be altered at will, and to use it, or a facsimile of it, by impressing or affixing it or in any other manner reproducing it;

(3) To make and amend bylaws, not inconsistent with its articles of incorporation or with the laws of this State, for managing the business and regulating the affairs of the corporation;

(4) To purchase, receive, lease, or otherwise acquire, and own, hold, improve, use, and otherwise deal with, real or personal property, or any legal or equitable interest in property, wherever located;

(5) To sell, convey, mortgage, pledge, lease, exchange, and otherwise dispose of all or any part of its property;

(6) To purchase, receive, subscribe for, or otherwise acquire; own, hold, vote, use, sell, mortgage, lend, pledge, or otherwise dispose of; and deal in and with shares or other interests in, or obligations of, any other entity;

(7) To make contracts and guarantees, incur liabilities, borrow money, issue its notes, bonds, and other obligations (which may be convertible into or include the option to purchase other securities of the corporation), and secure any of its obligations by mortgage or pledge of any of its property, franchises, or income;

(8) To lend money, invest and reinvest its funds, and receive and hold real and personal property as security for repayment;

(9) To be a promoter, partner, member, associate, or manager of any partnership, joint venture, trust, or other entity;

(10) To conduct its business, locate offices, and exercise the powers granted by this act within or without this State;

(11) To elect or appoint directors, officers, employees, and agents of the corporation, define their duties, fix their compensation, and lend them money and credit;

(12) To pay pensions and establish pension plans, pension trusts, profit sharing plans, stock bonus plans, stock option plans, and other benefit or incentive plans for any or all of its current or former directors, officers, employees, and agents;

(13) To make donations for the public welfare or for charitable, religious, cultural, scientific, or educational purposes;

(14) To transact any lawful business that will aid governmental policy;

(15) To make payments or donations, or do any other act, not inconsistent with law, that furthers the business and affairs of the corporation; and

(16) To provide insurance for its benefit on the life or physical or mental ability of any of its directors, officers or employees or on the life or physical or mental ability of any security holder for the purpose of acquiring at his death or disability its securities owned by such security holder, and for these purposes the corporation is deemed to have an insurable interest in its directors, officers, employees, or security holders; and to provide insurance for its benefit on the life or physical or mental ability of any other person in whom it has an insurable interest.

(b) It shall not be necessary to set forth in the articles of incorporation any of the powers enumerated in this section. (Code, ss. 663, 666, 691, 692, 693; 1893, c. 159; 1901, c. 2, s. 1; Rev., s. 1128; 1909, c. 507, s. 1; C.S., s. 1126; 1925, cc. 235, 298; 1929, c. 269; 1939, c. 279; 1945, c. 775; G.S., s. 55-26; 1951, c. 1240, s. 1; 1955, c. 1371, s. 1; 1959, c. 1316, ss. 4, 5; 1969, c. 751, ss. 7, 8; 1989, c. 265, s. 1.)

**Editor's Note.** — The section above is set out to correct two typographical errors in subsection (a).

## ARTICLE 4.

## *Name.*

### § 55-4-01. Corporate name.

(a) A corporate name:
- (1) Must contain the word "corporation", "incorporated", "company", or "limited", or the abbreviation "corp.", "inc.", "co.", or "ltd."; and
- (2) May not contain language stating or implying that the corporation is organized for a purpose other than that permitted by G.S. 55-3-01 and its articles of incorporation.

(b) Except as authorized by subsection (c), a corporate name must be distinguishable upon the records of the Secretary of State from:
- (1) The corporate name of a corporation incorporated or authorized to transact business in this State;
- (2) A corporate name reserved or registered under G.S. 55-4-02 or G.S. 55-4-03;
- (3) The fictitious name adopted by a foreign corporation authorized to transact business in this State because its real name is unavailable; and
- (4) The corporate name of a nonprofit corporation incorporated or authorized to transact business in this State.

(c) A person may apply to the Secretary of State for authorization to use a name that is not distinguishable upon his records from one or more of the names described in subsection (b). The Secretary of State shall authorize use of the name applied for if:
- (1) The other corporation consents to the use in writing and submits an undertaking in form satisfactory to the Secretary of State to change its name to a name that is distinguishable upon the records of the Secretary of State from the name of the applicant; or
- (2) The applicant delivers to the Secretary of State a certified copy of the final judgment of a court of competent jurisdiction establishing the applicant's right to use the name applied for in this State.

(d) Reserved for future codification purposes.

(e) The use of assumed names or fictitious names, as provided for in Chapter 66, is not affected by this Chapter.

(f) Neither the reservation or registration of a corporate name nor the incorporation of any domestic corporation shall authorize the use in this State of a corporate name in violation of the rights of any third party under the federal trademark act, the trademark act of this State, or other statutory or common law, or be a defense to an action for violation of any such rights.

(g) The name of a corporation dissolved under Article 14 may not be used by another corporation until the expiration of two years after the effective date of the dissolution unless the dissolved corporation consents in writing to the use. (1901, c. 2, s. 8; 1903, c. 453; Rev., s. 1137; 1913, c. 5, s. 1; C.S., s. 1114; 1935, cc. 166, 320; 1939, c. 222; G.S., s. 55-2; 1955, c. 1371, s. 1; 1959, c. 1316, s. 28; 1969, c. 751, ss. 4-6; 1973, c. 469, s. 45.3; 1989, c. 265, s. 1; 1989 (Reg. Sess., 1990), c. 1024, s. 12.5.)

### AMENDED NORTH CAROLINA COMMENTARY

Unlike the Model Act, former G.S. 55-12(a) did not permit a corporate name to contain "words or abbreviations of like import in another language." The drafters concluded that a corporate name should not contain foreign words or abbreviations to indicate corporateness and that it would be confusing to the Secretary of State's office to determine what foreign words or abbreviations are "of like import." Therefore, consistent with the provisions of the prior law, they omitted the Model Act language "or words or abbreviations of like import in another language" from subdivision (a)(1).

The Model Act was modified in subsection (c) to clarify that any person (not just a corporation) may apply for authorization under this subsection.

Subsection 4.01(d) of the Model Act is a restatement of the trade name law and therefore was deemed unnecessary.

Subsection (e) was rewritten for clarification.

Subsection (f) was added to bring forward the provisions of former G.S. 55-12(k).

Subsection (g), which is not in the Model Act, is an entirely new section that addresses the use of a dissolved corporation's name.

Former G.S. 55-12(b), which provided that a corporate name could not contain "any word or phrase which is likely to mislead the public or which indicates or implies that it is organized for any purpose other than one or more of the purposes contained in its charter," was not brought forward. The provision was aimed at preventing fraudulent business practices, and the drafters decided that this should be policed by the Attorney General rather than by the Secretary of State through the corporation laws.

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**Effect of Amendments.** — The 1989 (Reg. Sess., 1990) amendment, effective July 1, 1990, in the introductory language of subsection (c) substituted "A person" for "A corporation," and in subdivision (c)(1), substituted "applicant" for "applying corporation."

## § 55-4-04. Reserved and registered names, powers of the Secretary of State.

The Secretary of State may revoke any reservation or registration of a corporate name if he finds, upon a hearing not less than 15 days after the effective date of written notice given by registered or certified mail, return receipt requested, to the person or corporation who made the reservation or registration, that the application therefor or any transfer thereof was not made in good faith or that any statement contained in the application for reservation or registration was false when such application was filed or has thereafter become false. (1901, c. 2, s. 8; 1903, c. 453; Rev., s. 1137; 1913, c. 5, s. 1; C.S., s. 1114; 1935, cc. 166, 320; 1939, c. 222; G.S., s. 55-2; 1955, c. 1371, s. 1; 1959, c. 1316, s. 28; 1969, c. 751, ss. 4-6; 1973, c. 469, s. 45.3; 1989, c. 265, s. 1; 1993, c. 552, s. 7.)

**Effect of Amendments.** — The 1993 amendment, effective October 1, 1993, substituted "15 days" for "20 days", substituted "the effective date of written notice given" for "written notice has been sent" and substituted "therefor" for "thereof".

## § 55-4-05. Real property records.

(a) Whenever the name of any domestic or foreign corporation holding title to real property in this State is changed upon amendment to the articles of incorporation or whenever title to real property in this State is transferred by operation of law upon merger of two or more corporations, a certificate reciting such change or transfer shall be recorded in the office of the register of deeds of the county where the property lies, or if the property is located in more than one county, then in each county where any portion of the property lies.

(b) The Secretary of State shall adopt uniform certificates to be furnished for registration in accordance with this section. In the case of a foreign corporation, a similar certificate by any competent authority of the jurisdiction of incorporation may be registered in accordance with this section.

(c) The certificate required by this section shall be recorded by the register of deeds in the same manner as deeds, and for the same fees, but no formalities as to acknowledgement, probate, or approval by any other officer shall be required. The former name of the corporation holding title to the real property before the amendment or merger shall appear in the "Grantor" index, and the amended name of the corporation holding title to the real property by virtue of the amendment or merger shall appear in the "Grantee" index. (1989, c. 265, s. 1; 1991, c. 645, s. 2(a).)

**Effect of Amendments.** — The 1991 amendment, effective October 1, 1991, substituted "In the case of a foreign corporation" for "If corporation involved is not a domestic corporation or a foreign corporation authorized to do business in this State" in the second sentence of subsection (b).

## ARTICLE 5.

## *Office and Agent.*

## § 55-5-02. Change of registered office or registered agent.

(a) A corporation may change its registered office or registered agent by delivering to the Secretary of State for filing a statement of change that sets forth:

(1) The name of the corporation;
(2) The street address, and the mailing address if different from the street address, of the corporation's current registered office, and the county in which it is located;
(3) If the address of the corporation's registered office is to be changed, the street address, and the mailing address if different from the street address, of the new registered office, and the county in which it is located;
(4) The name of its current registered agent;
(5) If the current registered agent is to be changed, the name of the new registered agent and the new agent's written consent (either on the statement or attached to it) to the appointment; and

(6) That after the change or changes are made, the addresses of its registered office and the business office of its registered agent will be identical.

(b) If a registered agent changes the address of his business office, he may change the address of the registered office of any corporation for which he is the registered agent by notifying the corporation in writing of the change and signing (either manually or in facsimile) and delivering to the Secretary of State for filing a statement that complies with the requirements of subsection (a) and recites that the corporation has been notified of the change.

(c) A corporation may change its registered office or registered agent by including in its annual report required by G.S. 55-16-22 the information and any written consent required by subsection (a). (1901, c. 2, s. 31; Rev., s. 1176; C.S., s. 1133; G.S., s. 55-34; 1955, c. 1371, s. 1; 1957, c. 979, ss. 6, 7; 1965, c. 298, s. 1; 1967, c. 823, s. 17; 1973, c. 262; c. 469, s. 3; 1989, c. 265, s. 1; 1991, c. 645, s. 3.)

**Effect of Amendments.** — The 1991 amendment, effective October 1, 1991, added subsection (c).

## § 55-5-03. Resignation of registered agent.

(a) A registered agent may resign his agency appointment by signing and filing with the Secretary of State the signed original and two exact or conformed copies of a statement of resignation which may include a statement that the registered office is also discontinued. The statement must include or be accompanied by a certification from the registered agent that he has mailed or delivered to the corporation at its last known address written notice of this resignation. Such certification shall include the name and title of the officer notified, if any, and the address to which the notice was mailed or delivered.

(b) After filing the statement the Secretary of State shall mail one copy to the registered office (if not discontinued) and the other copy to the corporation at its principal office shown in its most recent annual report.

(c) The agency appointment is terminated, and the registered office discontinued if so provided, on the 31st day after the date on which the statement was filed. (1901, c. 2, s. 31; Rev., s. 1176; C.S., s. 1133; G.S., s. 55-34; 1955, c. 1371, s. 1; 1957, c. 979, ss. 6, 7; 1965, c. 298, s. 1; 1967, c. 823, s. 17; 1973, c. 262; c. 469, s. 3; 1989, c. 265, s. 1; 1989 (Reg. Sess., 1990), c. 1024, s. 12.6.)

### AMENDED NORTH CAROLINA COMMENTARY

The Model Act was modified in subsection (a) to require that the statement of resignation include or be accompanied by a certification that written notice of the resignation was mailed or delivered to the corporation. The certification must include the name and title of the officer notified (if any) and the address to which the notice of resignation was mailed or delivered.

**Effect of Amendments.** — The 1989 (Reg. Sess., 1990) amendment, effective July 1, 1990, in the second sentence of subsection (a), inserted "include or" preceding "be accompanied."

## § 55-5-04. Service on corporation.

### CASE NOTES

**Corporation Bound upon Service of Agent.** — Service of process upon a corporation's registered agent binds that corporation when the agent is served, not when the service actually comes to the attention of an officer or agent charged with defending actions against the corporation. Anderson Trucking Serv., Inc. v. Key Way Transp., Inc., 94 N.C. App. 36, 379 S.E.2d 665 (1989), decided under the former Business Corporation Act.

**Cited** in Patridge v. Associated Cleaning Consultants & Servs., Inc., 108 N.C. App. 625, 424 S.E.2d 664 (1993).

# ARTICLE 6.

## *Shares and Distribution.*

## Part 1. Shares.

## § 55-6-01. Authorized shares.

**Cross References.** — As to rights of holders of debt securities, see § 55-7-21.1.

## Part 2. Issuance of Shares.

## § 55-6-21. Issuance of shares.

(a) The powers granted in this section to the board of directors may be reserved to the shareholders by the articles of incorporation.

(b) The board of directors may authorize shares to be issued for consideration consisting of any tangible or intangible property or benefit to the corporation, including cash, promissory notes, services performed, contracts for services to be performed, or other securities of the corporation.

(c) Before the corporation issues shares, the board of directors must determine that the consideration received or to be received for shares to be issued is adequate. The determination by the board of directors as to the adequacy of consideration is conclusive as to whether the shares are validly issued, fully paid, and nonassessable.

(d) When the corporation receives the consideration for which the board of directors authorized the issuance of shares, the shares issued therefor are fully paid and nonassessable.

(e) The corporation may place in escrow shares issued for a contract for future services or benefits or for a promissory note, or make other arrangements to restrict the transfer of the shares, and may credit distributions in respect of the shares against their purchase price, until the services are performed, the note is paid, or the benefit received. If the services are not performed, the note is not paid, or the benefits are not received, the shares escrowed or restricted and the distributions credited may be cancelled in whole or part. (1901, c. 2, ss. 19, 53, 54; 1903, c. 660, ss. 2, 3; Rev. ss. 1159, 1160, 1161; C.S., ss. 1157, 1158; G.S., ss. 55-62, 55-63; 1955, c. 1371, s. 1; 1957, s. 1039; 1959, c. 1316, ss. 10, 13, 14; 1969, c. 751, s. 20; 1973, c. 469, ss. 15, 45.2; 1989, c. 265, s. 1; 1989 (Reg. Sess., 1990), c. 1024, s. 12.7.)

**Effect of Amendments.** — The 1989 (Reg. Sess., 1990) amendment, effective July 1, 1990, in subsection (e), substituted "for" for "to" preceding "a promissory note" in the first sentence.

## § 55-6-23. Share dividends.

(a) Unless the articles of incorporation provide otherwise, shares may be issued pro rata and without consideration to the corporation's shareholders or to the shareholders of one or more classes or series. An issuance of shares under this subsection is a share dividend.

(b) Shares of one class or series may not be issued as a share dividend in respect of shares of another class or series unless:

(1) The articles of incorporation so authorize,

(2) There are no outstanding shares of the class or series to be issued, or

(3) A majority of the votes entitled to be cast by the class or series to be issued approve the issuance of not more than a stated number of shares within a period of not more than one year after such approval.

(c) If the board of directors does not fix the record date for determining shareholders entitled to a share dividend, it is the date the board of directors authorizes the share dividend. (1955, c. 1371, s. 1; 1959, c. 1316, ss. 17, 18; 1989, c. 265, s. 1; 1989 (Reg. Sess., 1990), c. 1024, s. 12.8.)

**Effect of Amendments.** — The 1989 (Reg. Sess., 1990) amendment, effective July 1, 1990, substituted "approval" for "authorization" at the end of subdivision (b)(3).

## § 55-6-27. Restriction on transfer of shares and other securities.

(a) The articles of incorporation, bylaws, an agreement among shareholders, or an agreement between shareholders and the corporation may impose restrictions on the transfer or registration of transfer of shares of the corporation. A restriction does not affect shares issued before the restriction was adopted unless the holders of the shares are parties to the restriction agreement or voted in favor of the restriction.

(b) A restriction on the transfer or registration of transfer of shares is valid and enforceable against the holder or a transferee of the holder if the restriction is authorized by this section, it is not unconscionable under the circumstances, and its existence is noted conspicuously on the front or back of the certificate or is contained in the information statement required by G.S. 55-6-26(b). Unless so noted, a restriction is not enforceable except against a person who receives actual written notice of the restrictions.

(c) A restriction on the transfer or registration of transfer of shares is authorized:

(1) To maintain the corporation's status when it is dependent on the number or identity of its shareholders;
(2) To preserve exemptions under federal or state securities law;
(3) For any other reasonable purpose.

(d) A restriction authorized by G.S. 55-6-27(c) may:

(1) Obligate the shareholder first to offer the corporation or other persons (separately, consecutively, or simultaneously) an opportunity to acquire the restricted shares;
(2) Obligate the corporation or other persons (separately, consecutively, or simultaneously) to acquire the restricted shares;
(3) Require the corporation, the holders of any class of its shares, or another person to approve the transfer of the restricted shares, if the requirement is not manifestly unreasonable;
(4) Prohibit the transfer of the restricted shares to designated persons or classes of persons, if the prohibition is not manifestly unreasonable;
(5) Contain any other provision reasonably related to an authorized purpose.

(e) For purposes of this section, "shares" includes a security convertible into or carrying a right to subscribe for or acquire shares. (1989, c. 265, s. 1.)

**Editor's Note.** — The section above is set out to correct a typographical error in the first sentence of subsection (a).

## Part 3. Subsequent Acquisition of Shares by Shareholders and Corporation.

### § 55-6-30. Shareholders' preemptive rights.

(a) The shareholders of a corporation do not have a preemptive right to acquire the corporation's unissued shares except to the extent the articles of incorporation or subsection (d) of this section so provide.

(b) A statement included in the articles of incorporation that "the corporation elects to have preemptive rights" (or words of similar import) means that the following principles apply except to the extent the articles of incorporation expressly provide otherwise:

(1) The shareholders of the corporation have a preemptive right, granted on uniform terms and conditions prescribed by the board of directors, to provide a fair and reasonable opportunity to exercise the right, to acquire proportional amounts of the corporation's unissued shares upon the decision of the board of directors to issue them.
(2) A shareholder may waive his preemptive right. A waiver evidenced by a writing is irrevocable even though it is not supported by consideration.

(3) There is no preemptive right with respect to (i) shares issued as compensation to directors, officers, agents, or employees of the corporation, its subsidiaries or affiliates; (ii) shares issued to satisfy conversion or option rights created to provide compensation to directors, officers, agents, or employees of the corporation, its subsidiaries or affiliates; (iii) shares authorized in articles of incorporation that are issued within six months from the effective date of incorporation; (iv) shares issued for considerations, other than money, deemed by the board of directors in good faith to be advantageous to the corporation's business.

(4) Holders of a share of any class have no preemptive rights with respect to shares of any other class.

(5) Reserved for future codification purposes.

(6) Shares subject to preemptive rights that are not acquired by shareholders may be issued to any person during a period of one year after being offered to shareholders at a consideration set by the board of directors that is not lower than the consideration set for the exercise of preemptive rights. An offer at a lower consideration or after the expiration of one year is subject to the shareholders' preemptive rights.

(c) For purposes of this section, "shares" includes a security convertible into or carrying a right to subscribe for or acquire shares.

(d) Notwithstanding the foregoing provision of this section, shareholders of a corporation incorporated before July 1, 1990, other than a public corporation, shall have a preemptive right to acquire the unissued shares of the corporation, to the extent provided in (and subject to the limitations of) subdivisions (b) (1)-(6) and subsection (c) of this section, except to the extent the articles of incorporation expressly provide otherwise. (1955, c. 1371, s. 1; 1969, c. 751, ss. 29-32; 1979, c. 508, s. 2; 1989, c. 265, s. 1; 1993, c. 552, s. 8.)

**Effect of Amendments.** — The 1993 amendment, effective October 1, 1993, in subsection (d) substituted "before July 1, 1990, other than a public corporation" for "prior to July 1, 1990".

## § 55-6-31. Corporation's acquisition of its own shares.

### CASE NOTES

**Purpose of 1985 Amendment to Former § 55-52.** — The 1985 amendment to former § 55-52 was established to enable corporations to enter into written agreements with shareholders at the outset of the relationship for the issuance of stock redeemable at the shareholder's option. The statute was not designed to simply allow the corporation to enter into a written agreement with a shareholder to redeem stock out of and as an impairment to stated capital, which stock was already being held by the shareholder as common stock; rather, the purpose was to provide a new method for North Carolina corporations to raise needed capital by readily available cash infusions from shareholders in exchange for stock redeemable at their request. In re N.W. Oxygen, Inc., 99 Bankr. 703 (Bankr. M.D.N.C. 1989).

**Agreement Entered into Prior to Amendment.** — Where former shareholder had a note in exchange for the redemption of his shares in corporation, the note was unenforceable under former § 55-52, as subdivision (c)(3), rather than subdivision (b)(4) thereof, applied.

First, subdivision (b)(4) was an amendment to the original provision and was effective in 1985, while the agreement between former shareholder and debtor corporation was executed before the amendment was in effect; second, subdivision (b)(4) was established to enable corporations to enter agreements with shareholders for the issuance of stocks. In the instant case former shareholder and debtor entered into a written agreement some ten years after the issuance of the shares for the sale of the common stock which former shareholder owned. In re N.W. Oxygen, Inc., 99 Bankr. 703 (Bankr. M.D.N.C. 1989).

**Solvency Test for Each Payment under Former § 55-52(c).** — Since former § 55-52 specifically included the words "and pay for" in subsection (c), a solvency test for surplus had to occur each time a corporation made a payment on the indebtedness out of the assets of the corporation. In re N.W. Oxygen, Inc., 99 Bankr. 703 (Bankr. M.D.N.C. 1989).

**Redemption Agreement Held Unenforceable.** — Promissory note to a former shareholder in exchange for the redemption of his shares in corporation and underlying security interest were rendered unenforceable due to the corporation's subsequent insolvency and inability to make payment on the obligation out of sufficient surplus of corporate assets. In re N.W. Oxygen, Inc., 99 Bankr. 703 (Bankr. M.D.N.C. 1989), decided under the former Business Corporation Act.

## Part 4. Distributions.

## § 55-6-40. Distributions to shareholders.

(a) A board of directors may authorize and the corporation may make distributions to its shareholders subject to restriction by the articles of incorporation and the limitation in subsection (c).

(b) If the board of directors does not fix the record date for determining shareholders entitled to a distribution (other than one involving a purchase, redemption, or other acquisition of the corporation's shares), it is the date the board of directors authorizes the distribution.

(c) No distribution may be made if, after giving it effect:

(1) The corporation would not be able to pay its debts as they become due in the usual course of business; or

(2) The corporation's total assets would be less than the sum of its total liabilities plus (unless the articles of incorporation permit otherwise) the amount that would be needed, if the corporation were to be dissolved at the time of the distribution, to satisfy the preferential rights upon dissolution of shareholders whose preferential rights are superior to those receiving the distribution.

(d) The board of directors may base a determination that a distribution is not prohibited under subsection (c) on financial statements prepared on the basis of accounting practices and principles that are reasonable in the circumstances, and may determine asset values either on book values or on a fair valuation or other method that is reasonable in the circumstances.

(e) Except as provided in subsection (g), the effect of a distribution under subsection (c) is measured:

(1) In the case of distribution by purchase, redemption, or other acquisition of the corporation's shares, as of the earlier of (i) the date money or other property is transferred or debt incurred by the corporation or (ii) the date the shareholder ceases to be a shareholder with respect to the acquired shares;

(2) In the case of any other distribution of indebtedness, as of the date the indebtedness is distributed;

(3) In all other cases, as of (i) the date the distribution is authorized if the payment occurs within 120 days after the date of authorization or (ii) the date the payment is made if it occurs more than 120 days after the date of authorization.

(f) A corporation's indebtedness to a shareholder incurred by reason of a distribution made in accordance with this section is at parity with the corporation's indebtedness to its general, unsecured creditors except to the extent otherwise provided by agreement.

(g) Indebtedness of a corporation, including indebtedness issued as a distribution, is not considered a liability for purposes of determinations under subsection (c) if its terms provide that payment of principal and interest are made only if and to the extent that payment of a distribution to shareholders could then be made under this section. If an indebtedness with such terms is issued as a distribution, each payment of principal or interest is treated as a distribution the effect of which is measured on the date the payment is actually made.

(h) Any action by a shareholder to compel the payment of dividends may be brought against the directors, or against the corporation with or without joining the directors as parties. The shareholder bringing such action shall be entitled, in the event that the court orders the payment of a dividend, to recover from the corporation all reasonable expenses, including attorney's fees, incurred in maintaining such action. If a court orders the payment of a dividend, the amount ordered to be paid shall be a debt of the corporation.

(i) As used in this subsection, net profits shall mean such net profits as can lawfully be paid in dividends to a particular class of shares after making allowance for the prior claims of shares, if any, entitled to preference in the payment of dividends. If during its immediately preceding fiscal period a corporation having less than 25 shareholders on the final day of said period has not paid to any class of shares dividends in cash or property amounting to at least one-third of the net profits of said period allocable to that class, the holder or holders of twenty percent (20%) or more of the shares of that class may, within four months after the close of said period, make written demand upon the corporation for the payment of additional dividends for that period. After a corporation has received such a demand, the directors shall, during the then current fiscal period or within three months after the close thereof, either (i) cause dividends in cash or property to be paid to the shareholders of that class in an amount equal to the difference between the dividends paid in said preceding fiscal period to shareholders of that class and one-third of the net profits of said period allocable to that class, or in such lesser amount as may be demanded, or (ii) give notice pursuant to subsection (j) of this section to all shareholders making such demand. Such corporation shall not, however, be required to pay dividends pursuant to such demand insofar as (i) such payment would exceed fifty percent (50%) of the net profits of the current fiscal period in which such demand is made, or (ii) the net profits are being retained to eliminate a deficit, or (iii) the payment of dividends would be a breach of a bona fide agreement between the corporation and its creditors restricting the payment of dividends, or (iv) the directors of the corporation can show that its earnings are being retained to meet the reasonably anticipated needs of the business and that such retention of earnings is not inequitable in light of all the circumstances. Upon receipt of such a demand a corporation may elect to treat any dividend previously paid in the current fiscal period as having been paid in the preceding fiscal period, in which event the corporation shall so notify all shareholders. If a dividend is paid in satisfaction of a demand made in accordance with this subsection it shall be deemed to have been paid in the period for which it was demanded, and all shareholders shall be so informed concurrently with such payment.

(j) Upon receipt of a demand from the holders of twenty percent (20%) or more of the shares of any class of shares pursuant to subsection (i) of this section, the corporation receiving such demand may, during the then fiscal period or within three months after the close thereof, give written notice to each shareholder making such written demand that the corporation elects to redeem all shares held by such shareholder in lieu of the payment of dividends as provided in subsection (i) of this section and shall pay to such shareholder the fair value of his shares as of the day preceding the mailing or otherwise reasonably dispatching of the notice. A shareholder receiving such notice shall thereafter be entitled to withdraw his dividend demand by giving written notice of such withdrawal to the corporation within 10 days after receipt of the redemption notice of the corporation or, if no such withdrawal is made, to receive the fair value of his shares, subject only to the surrender by him of the certificate or certificates representing his shares and to the provisions of G.S. 55-6-31, which value shall be determined and paid as follows:

(1) If within 30 days after the date upon which a shareholder becomes entitled to payment for his shares under this subsection, the value of the shares is agreed upon between the shareholder and the corporation, payment therefor shall be made within 60 days after the agreement, upon surrender of the certificate representing the shares, whereupon the shareholder shall cease to have any interest in such shares or in the corporation.

(2) If within the such 30-day period the shareholder and the corporation do not agree as to the value of the shares, the shareholder may, within 60 days after the expiration of the 30-day period, file a petition in the superior court of the county of the registered office of the corporation asking for the appointment by the clerk of three qualified and disinterested appraisers to appraise the fair value of the shares. A summons as in other cases of special proceedings, together with a copy of the petition, shall be served on the corporation at least 10 days prior to the hearing of the petition by the court. The award of appraisers, or a majority of them, if no exceptions be filed thereto within 10 days after the award shall have been filed in court, shall be confirmed by the court, and when confirmed shall be final and conclusive, and the shareholder upon depositing the proper share certificates in court, shall be entitled to judgment against the corporation for the appraised value thereof as of the date prescribed in this section, together with interest thereon to the date of such confirmation. If either party files exceptions to such award within 10 days

after the award shall have been filed in court, the case shall be transferred to the civil issue docket of the superior court for trial during term and shall be there tried in the same manner, as near as may be practicable, as is provided in Chapter 40A for the trial of cases under the eminent domain law of this State, and with the same right of appeal as is permitted in said Chapter. The court shall assess the cost of said proceedings as it shall deem equitable. Upon payment of the judgment, the shareholder shall cease to have any interest in the shares or in the corporation and the corporation shall be entitled to have said share certificates surrendered to it by the clerk of court for cancellation. Unless the shareholder shall file such petition within the time herein prescribed, he and all persons claiming under him shall have no right of payment hereunder but in that event nothing herein shall impair his status as shareholder.

(k) Nothing in this section shall impair any rights which a shareholder may have on general principles of equity to compel the payment of dividends. (Code, s. 681; 1901, c. 2, ss. 33, 52; Rev., ss. 1191, 1192; C.S., ss. 1178, 1179; 1927, c. 121; 1933, c. 354, s. 1; G.S., ss. 55-115, 55-116; 1955, c. 1371, s. 1; 1957, c. 1039; 1959, c. 1316, ss. 16, 19, 35; 1963, c. 666; 1965, c. 726; 1967, c. 1163; 1969, c. 751, ss. 21-27, 45; 1973, c. 469, ss. 17-20; c. 683; c. 1067; c. 1087, ss. 3-5; 1975, c. 19, s. 17; c. 304; 1985, c. 117, s. 3; 1989, c. 265, s. 1; 1989 (Reg. Sess., 1990), c. 1024, s. 12.9; 1991, c. 645, s. 4.)

## AMENDED NORTH CAROLINA COMMENTARY

This section introduces significant changes from prior law in the criteria used to determine a corporation's legal capacity to pay dividends and reacquire its shares. The former surplus tests no longer apply. In addition, the provisions of former G.S. 55-52, which limited the circumstances under which a corporation could reacquire its shares, were not brought forward. All distributions to shareholders, whether by dividends or repurchases of shares, are determined by that distribution's impact on the corporation's solvency and the relationship between its assets and liabilities.

The Model Act was modified in subsection (d) to make it clear that for purposes of determining asset values under the equity insolvency and balance sheet tests of subsection (c), the board of directors may use either book values or a current valuation if it is reasonable under the circumstances. For purposes of determining liabilities and assets that are not revalued, the board of directors may rely on financial statements prepared in accordance with reasonable accounting practices and principles.

The Model Act was modified in subsection (f) to clarify that a corporation may agree to secure its indebtedness to a shareholder by granting a deed of trust or other security interest. The shareholder may also agree to subordinate the indebtedness, in whole or in part, to the corporation's indebtedness to its general, unsecured creditors. Absent an agreement either to secure or to subordinate a corporation's indebtedness to a shareholder, such indebtedness will be at parity with the corporation's indebtedness to its general, unsecured creditors.

Subsection (g) was added to the Model Act's provisions to address the question of how to treat a liability that by its own terms cannot be paid if its payment would violate this section. This change required the cross-reference added to subsection (e).

"Nimble dividends" (dividends paid out of current earnings) were expressly authorized under former G.S. 55-50(a)(2). That provision was not brought forward.

Subsections (h), (i), and (j) bring forward the provisions of former G.S. 55-50(k) through (m).

**Effect of Amendments.** — The 1989 (Reg. Sess., 1990) amendment, effective July 1, 1990, in subsection (f), substituted "otherwise provided" for "subordinated".

Session Laws 1991, c. 645, s. 4, effective October 1, 1991, substituted "to compel the payment of dividends" for "pursuant to subsection (i) and (j) of this section" in subsection (h), and added subsection (k).

### CASE NOTES

**Former § 55-50 allowed suit for improper withholding of dividend payments** against corporation, directors, majority shareholders and officers of the corporation. Wilson v. Wilson-Cook Medical, Inc., 720 F. Supp. 533 (M.D.N.C. 1989).

**Failure to State a Cause of Action.** — Claim against director of dissolved corporation did not state a cause of action where plaintiff only alleged that director was officer when corporation dissolved and where there was no allegation that corporation's assets were distributed by officers without providing for known or reasonably ascertainable liabilities. Heather Hills Home Owners Ass'n v. Carolina Custom Dev. Co., 100 N.C. App. 263, 395 S.E.2d 154 (1990), decided under former § 55-32.

**Shareholder Held Entitled to Attorneys' Fees.** — Plaintiff who brought action as the record owner of 42,748 shares of Preferred A stock of defendant corporation to recover a dividend was entitled to recover attorneys' fees under subsection (h) of former § 55-50. McGladrey, Hendrickson & Pullen v. Syntek Fin. Corp., 98 N.C. App. 151, 389 S.E.2d 636 (1990), aff'd, 330 N.C. 602, 411 S.E.2d 585 (1992).

**Disregard of Corporate Entity Upheld.** — Trial court was justified in disregarding the corporate entity and holding defendant personally liable to the extent of plaintiff's damages under the contract where defendant, who was president and sole shareholder of company, received substantial compensation from the sale of the corporation's assets without informing plaintiff of the sale or making provision for contractual debt to plaintiff. Hudson v. Jim Simmons Pontiac-Buick, Inc., 94 N.C. App. 563, 380 S.E.2d 612 (1989), decided under the former Business Corporation Act.

**Cited** in McGladrey, Hendrickson & Pullen v. Syntek Fin. Corp., 330 N.C. 602, 411 S.E.2d 585 (1992).

## ARTICLE 7.

## *Shareholders.*

## Part 1. Meetings.

### § 55-7-02. Special meeting.

(a) A corporation shall hold a special meeting of shareholders:

(1) On call of its board of directors or the person or persons authorized to do so by the articles of incorporation or bylaws; or

(2) Within 30 days after the holders of at least ten percent (10%) of all the votes entitled to be cast on any issue proposed to be considered at the proposed special meeting sign, date, and deliver to the corporation's secretary one or more written demands for the meeting describing the purpose or purposes for which it is to be held; except however that, unless otherwise provided in the articles of incorporation or bylaws, the call of a special meeting by shareholders is not available to the shareholders of a public corporation.

(b) If not otherwise fixed under G.S. 55-7-03 or G.S. 55-7-07, the record date for determining shareholders entitled to demand a special meeting is the date the first shareholder signs the demand.

(c) Special shareholders' meetings may be held in or out of this State at the place stated in or fixed in accordance with the bylaws. If no place is stated or fixed in accordance with the bylaws, special meetings shall be held at the corporation's principal office.

(d) Only business within the purpose or purposes described in the meeting notice required by G.S. 55-7-05(c) may be conducted at a special shareholders' meeting. (1901, c. 2, ss. 46, 49, 51; Rev., ss. 1179, 1188, 1190; C.S., ss. 1168, 1169, 1176; G.S., ss. 55-105, 55-106, 55-113; 1955, c. 1371, s. 1; 1959, c. 1316, ss. 21, 22; 1985 (Reg. Sess., 1986), c. 801, s. 44; 1989, c. 265, s. 1; 1991, c. 645, s. 17(a).)

**Effect of Amendments.** — The 1991 amendment, effective October 1, 1991, substituted "Within 30 days after" for "If" in subdivision (a)(2).

## § 55-7-03. Court-ordered meeting.

(a) The superior court of the county where a corporation's principal office (or, if none in this State, its registered office) is located may, after notice is given to the corporation, summarily order a meeting to be held:

(1) On application of any shareholder if an annual meeting of the shareholders was not held within 15 months after the corporation's last annual meeting; or

(2) On application of a shareholder who signed a demand for a special meeting valid under G.S. 55-7-02, if the corporation does not proceed to hold the meeting as required by that section.

(b) The court may fix the time and place of the meeting, determine the shares entitled to participate in the meeting, specify a record date for determining shareholders entitled to notice of and to vote at the meeting, prescribe the form and content of the meeting notice, fix the quorum required for specific matters to be considered at the meeting (or direct that the votes represented at the meeting constitute a quorum for action on those matters), enter other orders necessary to accomplish the purpose or purposes of the meeting, and award such reasonable expenses, including attorneys' fees, as it deems appropriate. (1901, c. 2, ss. 46, 49, 51; Rev., ss. 1179, 1188, 1190; C.S., ss. 1168, 1169, 1176; G.S., ss. 55-105, 55-106, 55-113; 1955, c. 1371, s. 1; 1959, c. 1316, ss. 21, 22; 1985 (Reg. Sess., 1986), c. 801, s. 44; 1989, c. 265, s. 1; 1991, c. 645, s. 17(b).)

**Effect of Amendments.** — The 1991 amendment, effective October 1, 1991, substituted the language beginning "the corporation does not proceed" for "(i) notice of the special meeting was not given within 30 days after the date the demand was received by the corporation's secretary; or (ii) the special meeting was not held in accordance with the notice" at the end of subdivision (a)(2).

## Part 2. Voting.

### § 55-7-20. Shareholders' list for meeting.

(a) After fixing a record date for a meeting, a corporation shall prepare an alphabetical list of the names of all its shareholders who are entitled to notice of a shareholders' meeting. The list must be arranged by voting group (and within each voting group by class or series of shares) and show the address of and number of shares held by each shareholder.

(b) The shareholders' list must be available for inspection by any shareholder, beginning two business days after notice of the meeting is given for which the list was prepared and continuing through the meeting, at the corporation's principal office or at a place identified in the meeting notice in the city where the meeting will be held. A shareholder, personally or by or with his representative, is entitled on written demand to inspect and, subject to the requirements of G.S. 55-16-02(c), to copy the list, during regular business hours and at his expense, during the period it is available for inspection.

(c) The corporation shall make the shareholders' list available at the meeting, and any shareholder, personally or by or with his representative, is entitled to inspect the list at any time during the meeting or any adjournment.

(d) If the corporation refuses to allow a shareholder or his representative to inspect the shareholders' list before or at the meeting (or copy the list as permitted by subsection (b)), the superior court of the county where a corporation's principal office (or, if none in this State, its registered office) is located, on application of the shareholder, after notice is given to the corporation, may summarily order the inspection or copying at the corporation's expense and may postpone the meeting for which the list was prepared until the inspection or copying is complete.

(e) Refusal or failure to prepare or make available the shareholders' list does not affect the validity of action taken at the meeting. (1955, c. 1371, s. 1; 1989, c. 265, s. 1; 1993, c. 552, s. 9.)

**Effect of Amendments.** — The 1993 amendment, effective October 1, 1993, in the second sentence of subsection (b) substituted "personally or by or with his representative" for "or his agent or attorney"; in subsection (c) substituted "personally or by or with his representative" for "his agent, or attorney"; and in subsection (d) substituted "shareholder or his representative" for "shareholder, his agent, or attorney".

### § 55-7-21.1. Rights of holders of debt securities.

In addition to any rights otherwise lawfully conferred, the articles of incorporation of the corporation may confer upon the holders of any bonds, debentures or other debt obligations issued or to be issued by the corporation any one or more of the following powers and rights upon such terms and conditions as may be prescribed in the articles of incorporation:

(1) The power to vote on any matter either in conjunction with or to the full or partial exclusion of its shareholders, notwithstanding G.S. 55-6-01(c)(1), and in determination of

votes and voting groups, the holders of such debt obligations shall be treated as shareholders;

(2) The right to inspect the corporate books and records;

(3) Any other rights concerning the corporation which its shareholders have or may have.

Any such power or right shall not be diminished, as to bonds, debentures or other obligations then outstanding, except by an amendment of the articles of incorporation approved by the vote or written consent of the holders of a majority in principal amount thereof or such larger percentage as may be specified in the articles of incorporation. (1969, c. 751, s. 19; 1989, c. 265, s. 1; 1989 (Reg. Sess., 1990), c. 1024, s. 12.10; 1991, c. 645, s. 5.)

**Effect of Amendments.** — The 1989 (Reg. Sess., 1990) amendment, effective July 1, 1990, in subdivision (1), added "notwithstanding G.S. 55-6-01(c)(1)", and redesignated the former second sentence of subdivision (3) as the present final paragraph of the section.

The 1991 amendment, effective October 1, 1991, added the language beginning "and in determination of votes" at the end of subdivision (1).

## § 55-7-25. Quorum and voting requirements for voting groups.

(a) Shares entitled to vote as a separate voting group may take action on a matter at a meeting only if a quorum of that voting group exists with respect to that matter, except that, in the absence of a quorum at the opening of any meeting of shareholders, such meeting may be adjourned from time to time by the vote of a majority of the votes cast on the motion to adjourn. Unless the articles of incorporation, a bylaw adopted by the shareholders, or this act provides otherwise, a majority of the votes entitled to be cast on the matter by the voting group constitutes a quorum of that voting group for action on that matter.

(b) Once a share is represented for any purpose at a meeting, it is deemed present for quorum purposes for the remainder of the meeting and for any adjournment of that meeting unless a new record date is or must be set for that adjourned meeting.

(c) If a quorum exists, action on a matter (other than the election of directors) by a voting group is approved if the votes cast within the voting group favoring the action exceed the votes cast opposing the action, unless the articles of incorporation, a bylaw adopted by the shareholders, or this Chapter requires a greater number of affirmative votes.

(d) An amendment of the articles of incorporation or bylaws adding, changing, or deleting a quorum or voting requirement for a voting group greater than specified in subsection (a) or (c) is governed by G.S. 55-7-27.

(e) The election of directors is governed by G.S. 55-7-28. (1901, c. 2, s. 39; Rev., s. 1182; C.S., s. 1175; 1927, c. 138; G.S., s. 55-112; 1955, c. 1371, s. 1; 1973, c. 469, ss. 21, 22; 1989, c. 265, s. 1; 1991, c. 645, s. 16(a).)

**Effect of Amendments.** — The 1991 amendment, effective October 1, 1991, in the first sentence of subsection (a), substituted "of that voting group" for "of those shares" and substituted "votes cast" for "shares voting."

### § 55-7-28. Voting for directors; cumulative voting.

(a) Unless otherwise provided in the articles of incorporation or in an agreement valid under G.S. 55-7-31, directors are elected by a plurality of the votes cast by the shares entitled to vote in the election at a meeting at which a quorum is present.

(b) Except as provided in subsection (e) of this section, shareholders do not have a right to cumulate their votes for directors unless the articles of incorporation so provide.

(c) A statement included in the articles of incorporation that "[all] [a designated voting group of] shareholders are entitled to cumulate their votes for directors" (or words of similar import) means that the shareholders designated are entitled to multiply the number of votes they are entitled to cast by the number of directors for whom they are entitled to vote and cast the product for a single candidate or distribute the product among two or more candidates.

(d) Shares otherwise entitled to vote cumulatively may not be voted cumulatively at a particular meeting unless:

(1) The meeting notice or proxy statement accompanying the notice states conspicuously that cumulative voting is authorized; or

(2) A shareholder or proxy who has the right to cumulate his votes announces in open meeting, before voting for directors starts, his intention to vote cumulatively; and if such announcement is made, the chair shall declare that all shares entitled to vote have the right to vote cumulatively and shall announce the number of votes represented in person and by proxy, and shall thereupon grant a recess of not less than one hour nor more than four hours, as he shall determine, or of such other period of time as is unanimously then agreed upon.

(e) Shareholders of a corporation incorporated in this State shall have the right to cumulate their votes for directors if

(1) The corporation was in existence prior to July 1, 1957, under a charter which does not grant the right of cumulative voting and at the time of the election the stock transfer book of such corporation discloses, or it otherwise appears, that there is at least one stockholder who owns or controls more than one-fourth of the voting stock of such corporation (shares represented at a meeting by revocable proxy relating to that meeting or adjourned meetings thereof shall not be deemed shares "controlled" within the meaning of this subsection), or if

(2) The corporation was incorporated on or after July 1, 1957, and before July 1, 1990,

unless, when the stock transfer books are closed or at the record date fixed to determine the shareholders entitled to receive notice of and to vote at the meeting of shareholders, the corporation is a public corporation as defined in G.S. 55-1-40(18a). This right to vote cumulatively may be denied or limited by amendment to the articles of incorporation, but no such amendment shall be made when the number of shares voting against the amendment would be sufficient to elect a director by cumulative voting if such shares are entitled to be voted cumulatively for the election of directors. (Rev., ss. 1183, 1184; 1907, c. 457, s. 1; 1909, c. 827, s. 1; C.S., s. 1173; 1945, c. 635; G.S., s. 55-110; 1951, c. 265, s. 2; 1953, c. 722; 1955, c.

1371, s. 1; 1959, c. 768; c. 1316, s. 23; 1963, c. 1065; 1969, c. 751, ss. 34, 35; 1985, c. 419; 1985 (Reg. Sess., 1986), c. 801, s. 45; 1989, c. 265, s. 1; 1989 (Reg. Sess., 1990), c. 1024, s. 12.11; 1991, c. 645, ss. 16(b), 19.)

### AMENDED NORTH CAROLINA COMMENTARY

The Model Act was modified in subsection (a) to clarify that an agreement valid under G.S. 55-7-31 may modify the vote by which directors are elected.

For corporations incorporated on or after July 1, 1990, subsection (b) changes prior law, which mandated cumulative voting except with respect to corporations having shares listed on national securities exchanges or held by more than 2,000 holders of record. A corporation may elect to retain cumulative voting by a provision in its articles of incorporation or in a shareholders' agreement complying with G.S. 55-7-31.

The provisions of subdivision (d)(2) were modified from the Model Act to conform with prior law with respect to the manner of electing to vote cumulatively.

Subsection (e) is a transitional provision that preserves cumulative voting for substantially all corporations that had cumulative voting by law prior to July 1, 1990.

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**Effect of Amendments.** — The 1989 (Reg. Sess., 1990) amendment, effective July 1, 1990, substituted the subdivision designators (1) and (2) for (i) and (ii), respectively, in subsection (e), and indented the language thereof.

Session Laws 1991, c. 645, s. 16(b), effective October 1, 1991, substituted "votes represented" for "shares present" in subdivision (d)(2).

Session Laws 1991, c. 645, s. 19, effective July 12, 1991, substituted "the corporation is a public corporation as defined in G.S. 55-1-40(18a)" for "shares of any class or series are listed on a national securities exchange or are held of record by more than 2,000 shareholders" in the undesignated language of subsection (e) following subdivision (e)(2).

## Part 4. Derivative Proceedings.

## § 55-7-40. Shareholders' derivative actions.

**Legal Periodicals.** —

For note, "Shareholder Derivative Suits Under the New North Carolina Business Corporation Act," see 68 N.C. L. Rev. 1091 (1990).

### CASE NOTES

**No Standing to Bring Suit Without Beneficial Interest.** — Plaintiff had no standing to bring suit challenging action of corporation where he failed to maintain his status as a holder of a beneficial interest in the stock of that corporation throughout the pendency of the litigation. Ashburn v. Wicker, 95 N.C. App. 162, 381 S.E.2d 876 (1989), decided under the former Business Corporation Act.

Plaintiff had no standing to challenge a loan made by defendant corporation to other defendant when plaintiff's beneficial interest, if any, in the defendant corporation consisted of a pledge of stock which secured a debt that was paid by another pledgee of the stock before plaintiff filed suit. Ashburn v. Wicker, 95 N.C. App. 162, 381 S.E.2d 876 (1989), decided under the former Business Corporation Act.

**Effect of Futility Doctrine.** — The futility doctrine does not allow a shareholder to bring a claim directly. Rather, it simply allows a shareholder to bring a derivative claim without first making demand upon corporate management. Thus, this doctrine offered no support to plaintiff's attempt to recover directly for the breach of his fellow directors' fiduciary duty to corporation. Silverman v. Miller, 155 Bankr. 362 (Bankr. E.D.N.C. 1993).

**Pledgee of corporate stock has a significant beneficial interest** to have standing to sue the corporation derivatively for mismanagement, provided he maintains an equitable interest in the collateral. Ashburn v. Wicker, 95 N.C. App. 162, 381 S.E.2d 876 (1989), decided under the former Business Corporation Act.

**Demand for Action by Directors as Prerequisite. —**

Minutes of board of directors meeting introduced into evidence by plaintiff confirmed that plaintiff made a motion that the corporation retain counsel to investigate the usurpation of a commercial leasing deal, and that this motion died for lack of a second. This action satisfied the demand requirement of this section, and any further demand would have been futile. Silverman v. Miller, 155 Bankr. 362 (Bankr. E.D.N.C. 1993).

**Recommendation of Special Litigation Committee. —**

The burden is on the movant, usually the corporation on whose behalf the suit was initiated, to prove the independence, disinterestedness, and appropriate qualifications of the committee and that it conducted a reasonable investigation in good faith of the matters alleged in the complaint. The committee is not entitled to a presumption of independence, disinterestedness, good faith, or reasonableness. Alford v. Shaw, 327 N.C. 526, 398 S.E.2d 445 (1990).

**In exercising its own independent business judgment,** the court must consider "such ethical, commercial, promotional, public relations and fiscal factors as may be involved in a given situation." Alford v. Shaw, 327 N.C. 526, 398 S.E.2d 445 (1990).

The corporation as the party seeking final disposition of the case under former § 55-55(c) (see now subsection (d) of this section) has the burden of going forward with evidence, on such items, and to show that continuing the action is more likely than not to be against the interests of the corporation. Of course, the shareholders initiating the suit are also entitled to present evidence and arguments as to their contentions. Ultimately, however, while "the review contemplated does not lend itself to any formula-like approach," it is for the court to decide whether the case begun in the superior court will continue. Alford v. Shaw, 327 N.C. 526, 398 S.E.2d 445 (1990).

**Trial judge may allow discovery to enable him to assess the committee of decision-makers,** the investigation made by the committee, the findings of the committee, and the recommendation of the committee. After hearing evidence on these matters, the trial court is to determine the independence, disinterestedness, and good faith of the committee in making its investigation, in addition to the reasonableness of the bases relied upon by the committee in concluding and recommending that the cause of action on behalf of the corporation be disposed of as recommended. Alford v. Shaw, 327 N.C. 526, 398 S.E.2d 445 (1990).

**Plaintiffs were not required to pursue statutory dissenters' rights** under former § 55-113 (see now Art. 13 of ch. 55) to oppose merger during litigation in order to maintain standing. Subdivision (c) of former § 55-113 would have deprived them of all interest in defendant corporation. Alford v. Shaw, 327 N.C. 526, 398 S.E.2d 445 (1990).

**Responsibility of Court When Party Challenges Recommendation of Corporation. —** Since proceedings under former § 55-55(c) (see now subsection (d) of this section) are held before a trial judge sitting without a jury, when a party challenges the recommendation of the corporation in whose name a lawsuit was initiated derivatively, it is the court's responsibility first, to require the party taking issue with the recommendation to outline his contentions so he may receive an appropriate response from the other parties to the suit, and then secondly, to hear evidence on these contentions, in order to be able to determine whether the lawsuit is to be discontinued, dismissed, settled, or turned over to the plaintiff-shareholders or the corporation for litigation. Alford v. Shaw, 327 N.C. 526, 398 S.E.2d 445 (1990).

**There was no requirement of continuing share ownership in former § 55-55** in order for an individual, who was a shareholder at the time of the transaction about which he was complaining and at the time the action was filed, to proceed with a derivative action. Had the legislature intended to include such a requirement in the corporate statutes, it would have done so. Alford v.

Shaw, 327 N.C. 526, 398 S.E.2d 445 (1990).

**Section Does Not Contain Continuing Share Ownership Requirement.** — This section, the new statute, while elaborating some of the procedures set forth in former § 55-55, does not contain a continuing share ownership requirement. Alford v. Shaw, 327 N.C. 526, 398 S.E.2d 445 (1990).

**No State Constitutional Right Exists to Trial by Jury of Factual Issues.** — Although a litigant's right to have a jury try issues of fact concerning the merits of the action initiated by the filing of a derivative suit complaint is guaranteed by the Constitution of North Carolina, the procedure required by former § 55-55(c) (see now subsection (d) of this section) did not exist before the adoption of the Constitution of 1868, and therefore no State constitutional right exists to a trial by jury of factual issues that might arise during the course of the proceedings required under this statute. Alford v. Shaw, 327 N.C. 526, 398 S.E.2d 445 (1990).

**A litigant has no right to the determination of factual issues by a jury** during proceedings occurring pursuant to former § 55-55(c) (see now subsection (d) of this section). In this section of the statute, it is clear that the word "court" referred to the trial judge and not to a jury. The remaining sentences of former § 55-55(c) referred to discretionary decisions exercisable properly only by the trial judge; clearly the legislature did not intend that a jury be involved in the procedures required under former § 55-55(c). Alford v. Shaw, 327 N.C. 526, 398 S.E.2d 445 (1990).

**Jury Properly Not Involved In Deciding Future of Case.** — The trial judge proceeded properly insofar as he did not involve a jury in the decision whether to allow the case to be discontinued, dismissed, compromised or settled. Alford v. Shaw, 327 N.C. 526, 398 S.E.2d 445 (1990).

**Judge May Need to Resolve Fact Issues to Determine Future of Case.** — As the judicial official charged under former § 55-55(c) (see now subsection (d) of this section) with this authority, the trial judge may well have to resolve issues of fact to decide whether to permit the suit to go forward, be settled, or be dismissed. Alford v. Shaw, 327 N.C. 526, 398 S.E.2d 445 (1990).

**Judge, Not Jury, Decides Whether Case Will Be Settled, Dismissed, etc.** — The hearing on motions filed under former § 55-55(c) (see now subsection (d) of this section) was appropriately held by the trial judge sitting without a jury. Alford v. Shaw, 327 N.C. 526, 398 S.E.2d 445 (1990).

**Trial Court's Review of Motions to Settle, Dismiss, Compromise or Discontinue.** — The trial court is to undertake a two-step review of motions brought under former § 55-55(c) (see now subsection (d) of this section): First, it is to decide whether the proposal for disposition of the case which is submitted to the court was reached by qualified independent disinterested decision-makers who in good faith proceeded to thoroughly investigate and evaluate the claims set forth in the complaint. The second step requires the trial court to exercise its own independent business judgment as to whether the case is to be discontinued, dismissed, compromised or settled. Alford v. Shaw, 327 N.C. 526, 398 S.E.2d 445 (1990).

**Procedure and Discovery in Hearing Concerning Motion to Dismiss, Settle, etc.** — For a case discussing interplay of rules and statutes governing procedure and discovery in shareholder's derivative action, particularly with respect to former § 55-55(c) (see now subsection (d) of this section) and § 1A-1, Rules 12, 23 and 56. Alford v. Shaw, 327 N.C. 526, 398 S.E.2d 445 (1990).

**Rule 23.1, Fed. R. Civ. P., is entirely consistent with this section,** as this section allows for a device that the federal rule does not contemplate. The terms of Rule 23.1 and the appointment of a committee pursuant to this section both can be fully honored in a federal court sitting in diversity. Crown Crafts, Inc. v. Aldrich, 148 F.R.D. 547 (E.D.N.C. 1993).

**Appointment of a committee** under subsection (c) of this section is generally more appropriate in the context of a publicly held corporation, or at the very least within a close corporation with more than two owners. The appointment of a committee would likely only delay litigation in action brought by minority shareholders of close corporation alleging breach of fiduciary duties and deceptive and unfair trade practices. Crown Crafts, Inc. v. Aldrich, 148 F.R.D. 547 (E.D.N.C. 1993).

**Issuance of Stay Pending Committee Report.** — The language of subsection (c), while not expressly granting it, contemplates the issuance of a stay pending the committee's report. The appointment of a committee would be meaningless if the litigation were allowed to continue pending its investigation. Crown Crafts, Inc. v. Aldrich, 148 F.R.D. 547 (E.D.N.C. 1993).

**Quoted** in Crown Crafts, Inc. v. Aldrich, 148 F.R.D. 151 (E.D.N.C. 1993).

## ARTICLE 8.

## *Directors and Officers.*

## Part 1. Board of Directors.

### § 55-8-01. Requirement for and duties of board of directors.

**Legal Periodicals.** —

For article, "The Corporate Persona, Contract (and Market) Failure, and Moral Values," see 69 N.C.L. Rev. 273 (1991).

For article, "Discrimination, Managerial Discretion and the Corporate Contract," see 26 Wake Forest L. Rev. 541 (1991).

For note, "Ignorance is not Bliss: Responsible Corporate Officers Convicted of Environmental Crimes and the Federal Sentencing Guidelines," see 1992 Duke L.J. 145.

### § 55-8-03. Number and election of directors.

(a) A board of directors must consist of one or more individuals, with the number specified in or fixed in accordance with the articles of incorporation or bylaws.

(b) The shareholders may from time to time increase or decrease the number of directors by amendment to the articles of incorporation or the bylaws, but no such decrease shall be made for a corporation to which G.S. 55-7-28(e) is applicable when the number of shares voting against the proposal for decrease would be sufficient to elect a director by cumulative voting if such shares are entitled to be voted cumulatively for the election of directors. If a board of directors has power under the articles of incorporation or bylaws to fix or change the number of directors and if the shareholders do not have the right to cumulate their votes for directors, the board may increase or decrease the number of directors by not more than thirty percent (30%) during any 12-month period.

(c) The articles of incorporation or bylaws may establish a variable range for the size of the board of directors by fixing a minimum and maximum number of directors. If a variable range is established, the number of directors may be fixed or changed from time to time, within the minimum and maximum, by the shareholders or (unless the articles of incorporation or an agreement valid under G.S. 55-7-31 shall otherwise provide) the board of directors. After shares are issued, only the shareholders may change the range for the size of the board or change from a fixed to a variable-range size board or vice versa.

(d) Directors are elected at the first annual shareholders' meeting and at each annual meeting thereafter unless their terms are staggered under G.S. 55-8-06. (1901, c. 2, ss. 14, 39; Rev., ss. 1147, 1182; C.S., ss. 1144, 1175; 1927, c. 138; G.S., ss. 55-48, 55-112; 1955,

c. 1371, s. 1; 1959, c. 1316, s. 33; 1969, c. 751, ss. 10, 11; 1989, c. 265, s. 1; 1993, c. 552, s. 13.)

**Effect of Amendments.** — The 1993 amendment, effective October 1, 1993, in the first sentence of subsection (b) inserted "for a corporation to which G.S. 55-7-28(e) is applicable".

## § 55-8-06. Staggered terms for directors.

If the number of directors is fixed at nine or more directors, the articles of incorporation or bylaws adopted by the shareholders may provide for staggering their terms by dividing the total number of directors into two, three, or four groups, with each group containing one-half, one-third, or one-fourth of the total, as near as may be. In that event, the terms of directors in the first group expire at the first annual shareholders' meeting after their election, the terms of the second group expire at the second annual shareholders' meeting after their election, the terms of the third group, if any, expire at the third annual shareholders' meeting after their election, and the terms of the fourth group, if any, expire at the fourth annual shareholders' meeting after their election. At each annual shareholders' meeting held thereafter, directors shall be chosen for a term of two, three, or four years, as the case may be, to succeed those whose terms expire. (1901, c. 2, ss. 14, 44; Rev., ss. 1147, 1148; C.S., s. 1144; 1937, c. 179; 1945, c. 200; 1949, c. 917; G.S., s. 55-48; 1955, c. 914, s. 1; c. 1371, s. 1; 1959, c. 1316, s. 7; 1989, c. 265, s. 1; 1993, c. 552, s. 10.)

**Effect of Amendments.** — The 1993 amendment, effective October 1, 1993, in the first sentence substituted "two, three, or four groups, with each group containing one-half, one-third, or one-fourth" for "two or three groups, with each group containing one-half or one-third"; in the second sentence deleted "and" preceding "the terms of the third group" and added at the end "and the terms of the fourth group, if any, expire at the fourth annual shareholders' meeting after their election"; and in the last sentence substituted "two, three, or four years" for "two years or three years".

## § 55-8-07. Resignation of directors.

(a) A director may resign at any time by communicating his resignation to the board of directors, its chairman, or the corporation.

(b) A resignation is effective when it is communicated unless it specifies in writing a later effective date or subsequent event upon which it will become effective. (1955, c. 1371, s. 1; 1959, c. 1316, s. 34; 1973, c. 469, s. 7; 1989, c. 265, s. 1.)

**Editor's Note.** — This section is set out to correct an error in subsection (a) of this section as it appears in the main volume.

## § 55-8-08. Removal of directors by shareholders.

(a) The shareholders may remove one or more directors with or without cause unless the articles of incorporation provide that directors may be removed only for cause.

(b) If a director is elected by a voting group of shareholders, only the shareholders of that voting group may participate in the vote to remove him.

(c) If cumulative voting is authorized, unless the entire board of directors is to be removed, a director may not be removed if the number of votes sufficient to elect him under cumulative voting is voted against his removal. If cumulative voting is not authorized, a director may be removed only if the number of votes cast to remove him exceeds the number of votes cast not to remove him.

(d) A director may not be removed by the shareholders at a meeting unless the notice of the meeting states that the purpose, or one of the purposes, of the meeting is removal of the director.

(e) Unless otherwise provided in the articles of incorporation or a bylaw adopted by the shareholders, the entire board of directors may be removed from office with or without cause by the affirmative vote of a majority of the votes entitled to be cast at any election of directors. (1955, c. 1371, s. 1; 1959, c. 1316, s. 34; 1973, c. 469, s. 7; 1989, c. 265, s. 1; 1991, c. 645, s. 6.)

### AMENDED NORTH CAROLINA COMMENTARY

This section is consistent with prior law as contained in former G.S. 55-27(f) with two notable differences. This section does not contain a specific provision allowing removal of the entire board by a majority vote, and the notice requirement of subsection (d) is new. Subsection (d) does not prohibit removal of a director by unanimous consent (*see* G.S. 55-7-04) but requires notice if the removal is to be considered at a meeting. The language of the Model Act was modified in this subsection for clarity.

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**Effect of Amendments.** — The 1991 amendment, effective October 1, 1991, inserted "unless the entire board of directors is to be removed" in subsection (c) and added subsection (e).

## § 55-8-10. Vacancy on board.

(a) Unless the articles of incorporation provide otherwise, if a vacancy occurs on a board of directors, including, without limitation, a vacancy resulting from an increase in the number of directors or from the failure by the shareholders to elect the full authorized number of directors:

(1) The shareholders may fill the vacancy;
(2) The board of directors may fill the vacancy; or
(3) If the directors remaining in office constitute fewer than a quorum of the board, they may fill the vacancy by the affirmative vote of a majority of all the directors, or by the sole director, remaining in office.

(b) If the vacant office was held by a director elected by a voting group of shareholders, only the remaining director or directors elected by that voting group or the holders of shares of that voting group are entitled to fill the vacancy.

(c) A vacancy that will occur upon a specific later date or subsequent event (by reason of a resignation effective upon a later date or subsequent event under G.S. 55-8-07(b) or otherwise) may be filled before the vacancy occurs but the new director may not take office until the vacancy occurs. (1955, c. 1371, s. 1; 1959, c. 1316, s. 34; 1973, c. 469, s. 7; 1989, c. 265, s. 1; 1989 (Reg. Sess., 1990), c. 1024, s. 12.12.)

### AMENDED NORTH CAROLINA COMMENTARY

This section is generally consistent with prior law. However, unlike the present section, former G.S. 55-27(c) permitted the bylaws as well as the articles of incorporation to withhold from directors the power to fill board vacancies and did not permit the directors to fill vacancies created by an increase in the authorized number of directors, except within a minimum-maximum range fixed by the shareholders.

This section expands the comparable Model Act section in subsection (a) by explicitly recognizing a vacancy occurring from failure by the shareholders to elect a full board and in subsection (b) by permitting the remaining directors elected by a voting group to fill a vacancy in that class of directors, both of which are consistent with former G.S. 55-27(c). The Model Act was modified in subsection (c) to conform to the changes made in G.S. 55-8-07(b) regarding the effective date of a resignation.

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**Effect of Amendments.** — The 1989 (Reg. Sess., 1990) amendment, effective July 1, 1990, in subsection (c), substituted "upon" for "at" in two places, and inserted "or subsequent event" in two places.

## Part 2. Meetings and Action of the Board.

### § 55-8-20. Meetings.

(a) The board of directors may hold regular or special meetings in or out of this State.

(b) Unless otherwise provided by the articles of incorporation, the bylaws, or the board of directors, any or all directors may participate in a regular or special meeting by, or conduct the meeting through the use of, any means of communication by which all directors participating may simultaneously hear each other during the meeting. A director participating in a meeting by this means is deemed to be present in person at the meeting.

(c) Unless the bylaws provide otherwise, special meetings of the board of directors may be called by the president or any two directors. (1955, c. 1371, s. 1; 1959, c. 1316, s. 8; 1969, c. 751, s. 12; 1973, c. 469, ss. 8-10; 1989, c. 265, s. 1; 1991, c. 645, s. 7.)

**Effect of Amendments.** — The 1991 amendment, effective October 1, 1991, in subsection (b) in the first sentence, inserted "otherwise provided by", substituted "the bylaws, or the board of directors any or all directors may" for "or bylaws provided otherwise, the board of directors, may permit any or all directors to", and added subsection (c).

## § 55-8-24. Quorum and voting.

### CASE NOTES

**No Cause of Action Stated.** — Claim against director of dissolved corporation did not state a cause of action where plaintiff only alleged that director was officer when corporation dissolved and where there was no allegation that corporation's assets were distributed by officers without providing for known or reasonably ascertainable liabilities. Heather Hills Home Owners Ass'n v. Carolina Custom Dev. Co., 100 N.C. App. 263, 395 S.E.2d 154 (1990), decided under former § 55-32.

## § 55-8-25. Committees.

### AMENDED NORTH CAROLINA COMMENTARY

The powers which may not be delegated to committees, specified in subsection (e) of this section, are different and more extensive than those specified in former G.S. 55-31(a). Also, this section contains no counterpart of former G.S. 55-31(c), which expressly held the board responsible for action of its committees. This difference is moderated by subsection (f) of the present section.

## Part 3. Standards of Conduct.

## § 55-8-30. General standards for directors.

(a) A director shall discharge his duties as a director, including his duties as a member of a committee:

(1) In good faith;
(2) With the care an ordinarily prudent person in a like position would exercise under similar circumstances; and
(3) In a manner he reasonably believes to be in the best interests of the corporation.

(b) In discharging his duties a director is entitled to rely on information, opinions, reports, or statements, including financial statements and other financial data, if prepared or presented by:

(1) One or more officers or employees of the corporation whom the director reasonably believes to be reliable and competent in the matters presented;
(2) Legal counsel, public accountants, or other persons as to matters the director reasonably believes are within their professional or expert competence; or
(3) A committee of the board of directors of which he is not a member if the director reasonably believes the committee merits confidence.

(c) A director is not entitled to the benefit of subsection (b) if he has actual knowledge concerning the matter in question that makes reliance otherwise permitted by subsection (b) unwarranted.

(d) A director is not liable for any action taken as a director, or any failure to take any action, if he performed the duties of his office in compliance with this section. The duties of a director weighing a change of control situation shall not be any different, nor the standard of care any higher, than otherwise provided in this section.

(e) A director's personal liability for monetary damages for breach of a duty as a director may be limited or eliminated only to the extent permitted in G.S. 55-2-02(b)(3), and a director may be entitled to indemnification against liability and expenses pursuant to Part 5 of Article 8 of this Chapter. (1955, c. 1371, s. 1; 1989, c. 265, s. 1; 1993, c. 552, s. 11.)

**Effect of Amendments.** — The 1993 amendment, effective October 1, 1993, added the second sentence of subsection (d).

**Legal Periodicals.** —

For article, "The Duty of Directors to Non-Shareholder Constituencies in Control Transactions — A Comparison of U.S. and U.K. Law," see 25 Wake Forest L. Rev. 61 (1990).

### CASE NOTES

**Duty Owed to Minority Shareholders.** —

Evidence was sufficient to establish a breach of defendant's fiduciary duty to plaintiff as a minority shareholder. Freese v. Smith, 110 N.C. App. 28, 428 S.E.2d 841 (1993).

**Fiduciary Duty as Question Where Revolving Fund Certificate Was Issued.** — Revolving fund certificate held by plaintiff issued in exchange for stock sold to defendant had some characteristics of a corporation/shareholder relationship; therefore, issue of whether defendants owed plaintiff a fiduciary duty was properly submitted to the jury. HAJMM Co. v. House of Raeford Farms, Inc., 94 N.C. App. 1, 379 S.E.2d 868, reversed on other grounds, HAJMM Co. v. House of Raeford Farms, Inc., 328 N.C. 578, 403 S.E.2d 483 (1991), appeal of right allowed pursuant to Rule 16(b) and petition allowed as to additional issues, 325 N.C. 271, 382 S.E.2d 439 (1989), decided under the former Business Corporation Act.

**Genuine Issue of Material Fact Shown.** — Where defendants submitted a number of affidavits tending to substantiate their version of the facts and where plaintiff responded with evidence which, if believed, would enable a jury to find in the corporation's favor, the parties' submissions created a genuine issue of material fact as to whether defendants breached their duty of loyalty by diverting a deal from the corporation for which they were directors to another corporation so as to warrant denial of defendants' summary judgment motion. Silverman v. Miller, 155 Bankr. 362 (Bankr. E.D.N.C. 1993).

**Stated** in IRA ex rel. Oppenheimer v. Brenner Cos., 107 N.C. App. 16, 419 S.E.2d 354, cert. denied, 332 N.C. 666, 424 S.E.2d 401 (1992).

## § 55-8-31. Director conflict of interest.

**Legal Periodicals.** —

For article, "Fairness and Trust in Corporate Law," see 1993 Duke L.J. 425.

### CASE NOTES

**Adversely Interested Party Must Prove, etc.** —

Where officer of corporation engaged in transactions which were not approved by the corporate defendants or shareholders, the burden was on him to prove that the transactions were just and reasonable. Lowder v. All Star Mills, Inc., 103 N.C. App. 479, 405 S.E.2d 794 (1991).

## § 55-8-33. Liability for unlawful distributions.

### CASE NOTES

**Trial court was justified in disregarding the corporate entity** and holding defendant personally liable to the extent of plaintiff's damages under the contract where defendant, who was president and sole shareholder of company, received substantial compensation from the sale of the corporation's assets without informing plaintiff of the sale or making provision for contractual debt to plaintiff. Hudson v. Jim Simmons Pontiac-Buick, Inc., 94 N.C. App. 563, 380 S.E.2d 612 (1989), decided under the former Business Corporation Act.

**No Cause of Action Stated. —** Claim against director of dissolved corporation did not state a cause of action where plaintiff only alleged that director was officer when corporation dissolved and where there was no allegation that corporation's assets were distributed by officers without providing for known or reasonably ascertainable liabilities. Heather Hills Home Owners Ass'n v. Carolina Custom Dev. Co., 100 N.C. App. 263, 395 S.E.2d 154 (1990), decided under former § 55-32.

## Part 4. Officers.

## § 55-8-40. Officers.

(a) A corporation has the officers described in its bylaws or appointed by the board of directors in accordance with the bylaws.

(b) A duly appointed officer may appoint one or more officers or assistant officers if authorized by the bylaws or the board of directors.

(c) The secretary or any assistant secretary or any one or more other officers designated by the bylaws or the board of directors shall have the responsibility and authority to maintain and authenticate the records of the corporation.

(d) The same individual may simultaneously hold more than one office in a corporation, but no individual may act in more than one capacity where action of two or more officers is required.

(e) Whenever a specific office is referred to in this Chapter, it shall be deemed to include any individual who, alone or collectively with one or more other individuals, holds or occupies such office. (1901, c. 2, ss. 15, 16, 17; Rev., ss. 1149, 1150, 1151; C.S., s. 1145; G.S., s. 55-49; 1955, c. 1371, s. 1; 1959, c. 1316, s. 9; 1973, c. 1217; 1989, c. 265, s. 1; 1989 (Reg. Sess., 1990), c. 1024, s. 12.13.)

### AMENDED NORTH CAROLINA COMMENTARY

This section was adapted from the corresponding section of the Model Act with several changes. The word "required" was deleted from the catchline of the section because it covers officers that are optional as well as those that are required.

No changes were made in subsections (a) and (b). Subsection (b) permits the board of directors to authorize officers to appoint other officers or assistant officers, whereas former G.S. 55-34 was silent on this point. The drafters were in favor of this provision but noted that the appointment should be documented as a practical matter, e.g., in the minute books.

Subsection (c) was changed to designate the secretary or any assistant secretary as the officers who have responsibility and authority to maintain and authenticate corporate records, subject to any other provision in the bylaws, in accordance with existing practice, and subsection (d) was changed by adding the final clause relating to acting in a dual capacity when the action of more than one officer is required, thus conforming to former G.S. 55-34(a). Subsection (e) brings forward the last sentence of former G.S. 55-34(a) with updated terminology.

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**Effect of Amendments.** — The 1989 (Reg. Sess., 1990) amendment, effective July 1, 1990, in subsection (e), substituted "any individual who, alone" for "any person who individually," and substituted "other individuals" for "other persons."

## § 55-8-42. Standards of conduct for officers.

### CASE NOTES

**Fiduciary Duty as Question Where Revolving Fund Certificate Was Issued.** — Revolving fund certificate held by plaintiff issued in exchange for stock unsold to defendant had some characteristics of a corporation/shareholder relationship; therefore, issue of whether defendants owed plaintiff a fiduciary duty was properly submitted to the jury. HAJMM Co. v. House of Raeford Farms, Inc., 94 N.C. App. 1, 379 S.E.2d 868, rev'd on other grounds, HAJMM Co. v. House of Raeford Farms, Inc., 328 N.C. 578, 403 S.E.2d 483 (1991) (decided under the former Business Corporation Act).

**Stated** in IRA ex rel. Oppenheimer v. Brenner Cos., 107 N.C. App. 16, 419 S.E.2d 354, cert. denied, 332 N.C. 666, 424 S.E.2d 401 (1992).

## Part 5. Indemnification.

## § 55-8-50. Policy statement and definitions.

(a) It is the public policy of this State to enable corporations organized under this Chapter to attract and maintain responsible, qualified directors, officers, employees and agents, and, to that end, to permit corporations organized under this Chapter to allocate the risk of personal liability of directors, officers, employees and agents through indemnification and insurance as authorized in this Part.

(b) Definitions in this Part:

(1) "Corporation" includes any domestic or foreign corporation absorbed in a merger which, if its separate existence had continued, would have had the obligation or power to indemnify its directors, officers, employees, or agents, so that a person who would have been entitled to receive or request indemnification from such corporation if its separate existence had continued shall stand in the same position under this Part with respect to the surviving corporation.

(2) "Director" means an individual who is or was a director of a corporation or an individual who, while a director of a corporation, is or was serving at the corporation's request as a director, officer, partner, trustee, employee, or agent of another foreign or domestic corporation, partnership, joint venture, trust, employee benefit plan, or other enterprise. A director is considered to be serving an employee benefit plan at the corporation's request if his duties to the corporation also impose duties on, or otherwise involve services by, him to the plan or to participants in or beneficiaries of the plan. "Director" includes, unless the context requires

otherwise, the estate or personal representative of a director.

(3) "Expenses" means expenses of every kind incurred in defending a proceeding, including counsel fees.

(4) "Liability" means the obligation to pay a judgment, settlement, penalty, fine (including an excise tax assessed with respect to an employee benefit plan), or reasonable expenses incurred with respect to a proceeding.

(4a) "Officer", "employee", or "agent" includes, unless the context requires otherwise, the estate or personal representative of a person who acted in that capacity.

(5) "Official capacity" means: (i) when used with respect to a director, the office of director in a corporation; and (ii) when used with respect to an individual other than a director, as contemplated in G.S. 55-8-56, the office in a corporation held by the officer or the employment or agency relationship undertaken by the employee or agent on behalf of the corporation. "Official capacity" does not include service for any other foreign or domestic corporation or any partnership, joint venture, trust, employee benefit plan, or other enterprise.

(6) "Party" includes an individual who was, is, or is threatened to be made a named defendant or respondent in a proceeding.

(7) "Proceeding" means any threatened, pending, or completed action, suit, or proceeding, whether civil, criminal, administrative, or investigative and whether formal or informal. (1955, c. 1371, s. 1; 1969, c. 797, s. 2; 1973, c. 469, s. 6; 1985 (Reg. Sess., 1986), c. 1027, s. 39; 1989, c. 265, s. 1; 1993, c. 552, s. 12.)

**Effect of Amendments.** — The 1993 amendment, effective October 1, 1993, rewrote subdivision (b)(1) and added subdivision (b)(4a).

## § 55-8-51. Authority to indemnify.

(a) Except as provided in subsection (d), a corporation may indemnify an individual made a party to a proceeding because he is or was a director against liability incurred in the proceeding if:

(1) He conducted himself in good faith; and

(2) He reasonably believed (i) in the case of conduct in his official capacity with the corporation, that his conduct was in its best interests; and (ii) in all other cases, that his conduct was at least not opposed to its best interests; and

(3) In the case of any criminal proceeding, he had no reasonable cause to believe his conduct was unlawful.

(b) A director's conduct with respect to an employee benefit plan for a purpose he reasonably believed to be in the interests of the participants in and beneficiaries of the plan is conduct that satisfies the requirement of subsection (a)(2)(ii).

(c) The termination of a proceeding by judgment, order, settlement, conviction, or upon a plea of no contest or its equivalent is not, of itself, determinative that the director did not meet the standard of conduct described in this section.

(d) A corporation may not indemnify a director under this section:

(1) In connection with a proceeding by or in the right of the corporation in which the director was adjudged liable to the corporation; or

(2) In connection with any other proceeding charging improper personal benefit to him, whether or not involving action in his official capacity, in which he was adjudged liable on the basis that personal benefit was improperly received by him.

(e) Indemnification permitted under this section in connection with a proceeding by or in the right of the corporation that is concluded without a final adjudication on the issue of liability is limited to reasonable expenses incurred in connection with the proceeding.

(f) The authorization, approval or favorable recommendation by the board of directors of a corporation of indemnification, as permitted by this section, shall not be deemed an act or corporate transaction in which a director has a conflict of interest, and no such indemnification shall be void or voidable on such ground. (1955, c. 1371, s. 1; 1969, c. 797, s. 2; 1973, c. 469, s. 6; 1985 (Reg. Sess., 1986), c. 1027, s. 39; 1989, c. 265, s. 1.)

**Editor's Note.** — The section above is set out to correct a typographical error in subsection (c).

## § 55-8-57. Additional indemnification and insurance.

(a) In addition to and separate and apart from the indemnification provided for in G.S. 55-8-51, 55-8-52, 55-8-54, 55-8-55 and 55-8-56, a corporation may in its articles of incorporation or bylaws or by contract or resolution indemnify or agree to indemnify any one or more of its directors, officers, employees, or agents against liability and expenses in any proceeding (including without limitation a proceeding brought by or on behalf of the corporation itself) arising out of their status as such or their activities in any of the foregoing capacities; provided, however, that a corporation may not indemnify or agree to indemnify a person against liability or expenses he may incur on account of his activities which were at the time taken known or believed by him to be clearly in conflict with the best interests of the corporation. A corporation may likewise and to the same extent indemnify or agree to indemnify any person who, at the request of the corporation, is or was serving as a director, officer, partner, trustee, employee, or agent of another foreign or domestic corporation, partnership, joint venture, trust or other enterprise or as a trustee or administrator under an employee benefit plan. Any provision in any articles of incorporation, bylaw, contract, or resolution permitted under this section may include provisions for recovery from the corporation of reasonable costs, expenses, and attorneys' fees in connection with the enforcement of rights to indemnification granted therein and may further include provisions establishing reasonable procedures for determining and enforcing the rights granted therein.

(b) The authorization, adoption, approval, or favorable recommendation by the board of directors of a public corporation of any provision in any articles of incorporation, bylaw, contract or resolution, as permitted in this section, shall not be deemed an act or corporate transaction in which a director has a conflict of interest, and no such articles of incorporation or bylaw provision or contract or resolution shall be void or voidable on such grounds. The authorization, adoption, approval, or favorable recommendation by the board of directors of a nonpublic corporation of any provision in any articles of incorporation, bylaw, contract or resolution, as permitted in this section, which occurred prior to July 1, 1990, shall not be deemed an act or corporate transaction in which a director has a conflict of interest, and no such articles of incorporation, bylaw provision, contract or resolution shall be void or voidable on such grounds. Except as permitted in G.S. 55-8-31, no such bylaw, contract, or resolution not adopted, authorized, approved or ratified by shareholders shall be effective as to claims made or liabilities asserted against any director prior to its adoption, authorization, or approval by the board of directors.

(c) A corporation may purchase and maintain insurance on behalf of an individual who is or was a director, officer, employee, or agent of the corporation, or who, while a director, officer, employee, or agent of the corporation, is or was serving at the request of the corporation as a director, officer, partner, trustee, employee, or agent of another foreign or domestic corporation, partnership, joint venture, trust, employee benefit plan, or other enterprise, against liability asserted against or incurred by him in that capacity or arising from his status as a director, officer, employee, or agent, whether or not the corporation would have power to indemnify him against the same liability under any provision of this Chapter. (1955, c. 1371, s. 1; 1969, c. 797, s. 1; 1973, c. 469, s. 5; 1985 (Reg. Sess., 1986), c. 1027, ss. 35-38; 1989, c. 265, s. 1; 1989 (Reg. Sess., 1990), c. 1024, s. 12.14.)

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Section 8.57 of the Model Act is entitled "Insurance" and deals only with that subject. In the North Carolina version the catchline has been expanded and the section is intended to permit broad nonstatutory indemnification completely in addition to and notwithstanding any other provisions of this Act. G.S. 55-8-50(a) expressly states that purpose and declares it to be the public policy of North Carolina.

This section permits indemnification, insurance and reimbursement of expenses in addition to, and notwithstanding, any other provisions of this Chapter. The section embodies the public policy of this State set forth in G.S. 55-8-50(a) to permit a corporation organized under this Chapter to spread the risk of corporate management, notwithstanding any other general or special law of this State or of any other jurisdiction including the federal government.

Subsection (a) permits and defines the scope of contractual indemnification under which the corporation, essentially as a self-insurer, may commit in advance to indemnify its directors, officers, employees or agents. This provision brings forward and clarifies all of former G.S. 55-19(a), which was added by the 1986 amendments. It adds an express statement, for example, that a corporation may agree in advance to indemnify its personnel even in a corporate or derivative action, subject only to the limitation brought forth from former G.S. 55-19(a).

Similarly, subsection (b) brings forward former G.S. 55-19(b) relating to the conflict of interest rules in G.S. 55-8-31 (which replaced former G.S. 55-30), but the application of the subsection to indemnification plans adopted on or after July 1, 1990 has been limited to public corporations (i.e., those required to file reports under Section 12 of the Securities Exchange Act of 1934). This limitation to public corporations was considered appropriate because (1) former G.S. 55-19(b) was intended to deal with the need to attract qualified outside directors — a need experienced mainly by public corporations, (2) shareholders of public corporations receive current disclosure of material changes in the indemnification scheme, and (3) shareholders have an active market in which they can dispose of their shares if they disapprove of a particular scheme of indemnification. Subsection (b) does not prevent a shareholder from challenging indemnification in a particular case. Instead, its effect is to shift to the shareholder of a public corporation the burden of proving that indemnification constitutes a breach of duty to the corporation under all of the facts and circumstances, including the facts and circumstances existing at the time indemnification was authorized or approved.

Subsection (c) replaces former G.S. 55-19(c) with section 8.57 of the Model Act because the drafters concluded that these insurance provisions of the Model Act are broader and clearer than former G.S. 55-19(c). Subsection (c) applies whether or not a corporation provides additional indemnification pursuant to subsections (a) and (b). As previously noted, former G.S. 55-19(d) was brought forward as G.S. 55-8-53.

**Effect of Amendments.** — The 1989 (Reg. Sess., 1990) amendment, effective July 1, 1990, deleted "on or" preceding "prior to July 1, 1990" in subsection (b).

## ARTICLE 9.

## *Shareholder Protection Act.*

### § 55-9-01. Short title and definitions.

**Legal Periodicals.** —

For article, "The Corporate Persona, Contract (and Market) Failure, and Moral Values," see 69 N.C.L. Rev. 273 (1991).

### § 55-9-05. Exemptions.

The provisions of G.S. 55-9-02 shall not be applicable to any corporation that shall be made the subject of a business combination by an other entity if: (i) the corporation was not a public corporation (as defined in G.S. 55-1-40(18a)) at the time such other entity acquired in excess of ten percent (10%) of the voting shares; (ii) on or before September 30, 1990 (or such earlier date as may be irrevocably established by resolution of the board of directors), the board of directors of a corporation to which G.S. 55-9-02 was not applicable on July 1, 1990, (other than a corporation described in G.S. 55-9-05(iii)) adopted a bylaw stating that the provisions of this Article shall not be applicable to the corporation; (iii) in the case of a corporation to which G.S. 55-9-02 was not applicable on July 1, 1990, as the result of adoption by its board of directors under G.S. 55-9-05(ii) of a bylaw providing that G.S. 55-9-02 not apply to such corporation, the board of directors of such corporation shall not have rescinded such bylaw on or before September 30, 1990 (or such earlier date as may be irrevocably established by resolution of the board of directors); (iv) in the case of a corporation (including its predecessors) which becomes a public corporation for the first time after July 1, 1990, such corporation adopts a bylaw within 90 days of becoming a public corporation stating that the provisions of this Article shall not be applicable to it; (v) in the case of a newly formed corporation after April 23, 1987, the initial articles of incorporation of the corporation shall provide that the provisions of this Article shall not be applicable; or (vi) such business combination was the subject of an existing agreement of the corporation on April 23, 1987. Neither the adoption or failure to adopt a bylaw of the type set forth in G.S. 55-9-05(ii) or (iv) nor the rescission or failure to rescind a bylaw of the type referred to in G.S. 55-9-05(iii) shall constitute grounds for any cause of action, at law or in equity, against the corporation or any of its directors. (1987, c. 88, s. 1; 1989, c. 265, s. 1; 1989 (Reg. Sess., 1990), c. 1024, s. 12.15.)

**Effect of Amendments.** — The 1989 (Reg. Sess., 1990) amendment, effective July 1, 1990, in clause (iv) inserted "a" following "in the case of."

## ARTICLE 9A.

### *Control Share Acquisitions.*

### § 55-9A-01. Short title and definitions.

(a) The provisions of this Article shall be known and may be cited as The North Carolina Control Share Acquisition Act.

(b) In this Article:

(1) "Beneficial ownership" of shares means the sole or shared ownership of any shares or the sole or shared power to vote any shares or to direct the exercise of voting power of any shares, whether such ownership or power is direct or indirect or through any contract, arrangement, understanding, relationship or otherwise, and includes shares beneficially owned by any person acting in concert with such beneficial owner pursuant to any contract, arrangement, understanding, relationship or otherwise. Notwithstanding the foregoing, beneficial ownership does not include shares acquired in the ordinary course of business for the benefit of others in good faith and not for the purpose of circumventing this Article, unless the acquiror of such shares may exercise or direct the exercise of voting of such shares without instruction from others.

(2) "Control shares" means shares of a covered corporation that when added to all other shares of the corporation beneficially owned by a person would entitle (except for this Article) that person to voting power in the election of directors that is equal to or greater than any of the following levels of voting power:

a. One-fifth of all voting power.
b. One-third of all voting power.
c. A majority of all voting power.

(3) "Control share acquisition" means the acquisition by any person of beneficial ownership of control shares, except that the acquisition of beneficial ownership of any shares of a covered corporation does not constitute a control share acquisition if the acquisition is consummated in any of the following circumstances:

a. Before April 30, 1987.
b. Pursuant to a contract existing before April 30, 1987, with either:

(i) The covered corporation; or
(ii) A seller of such shares who owned such shares before April 30, 1987.
c. Pursuant to the laws of descent and distribution.
d. Pursuant to the satisfaction of a pledge or other security interest created in good faith and not for the purpose of circumventing this Article.
e. Pursuant to a merger or share exchange effected in compliance with applicable law, but only if pursuant to an agreement of merger or share exchange to which the covered corporation is a party.
f. Pursuant to the sale of such shares by the covered corporation or its parent or subsidiary corporation.
g. Pursuant to a written agreement to which the covered corporation is a party that permits the purchasers of shares from the covered corporation or its parent or subsidiary corporation also to purchase in any manner within 90 days before or after the purchase from the covered corporation or its parent or subsidiary up to the same aggregate number of shares as were sold by the covered corporation or its parent or subsidiary corporation.
h. By an employee benefit plan established by the covered corporation.
i. Before the corporation became a covered corporation.

For purposes of this definition, shares acquired within any consecutive 90-day period or shares acquired pursuant to a plan to make a control share acquisition are considered to have been acquired in the same acquisition.

(4) "Interested shares" means the shares of a covered corporation beneficially owned by any of the following persons:
a. Any person who has acquired or proposes to acquire control shares in a control share acquisition.
b. Any officer of the covered corporation.
c. Any employee of the covered corporation who is also a director of the corporation.

(5) "Covered corporation" means a corporation that:
a. Is incorporated under the laws of North Carolina and has substantial assets within North Carolina;
b. Has a class of shares registered under Section 12 of the Securities Exchange Act of 1934;
c. Has its principal place of business or principal office within North Carolina; and
d. Has either:
(i) More than ten percent (10%) of its shareholders resident in North Carolina; or
(ii) More than ten percent (10%) of its shares owned by North Carolina residents.

(6) The residence of a shareholder is presumed to be the address appearing in the records of the corporation.

(7) For purposes of calculating the percentages or numbers described in subsection (b)(5) of this section, any shares held in trust or by a nominee shall be deemed to be held by the beneficiaries of such trust or by the beneficiaries of such shares held by such nominee. (1987, c. 182, s. 1; 1989, c.

200, s. 1; c. 265, s. 1; 1989 (Reg. Sess., 1990), c. 1024, s. 12.16.)

**Effect of Amendments.** — The 1989 (Reg. Sess., 1990) amendment, effective July 1, 1990, in paragraph (f) of subdivision (b)(3), deleted language which formerly followed "subsidiary corporation" and which read "provided that in such case a written agreement relating to such sale to which the covered corporation is a party may permit the purchasers of such shares as a group also to purchase in any other manner within 90 days before or after such sale up to the same aggregate number of shares as were sold by the covered corporation or its parent or subsidiary corporation without any such purchases being a 'control share acquisition'."

## ARTICLE 10.

## *Amendment of Articles of Incorporation and Bylaws.*

## Part 1. Amendment of Articles of Incorporation.

### § 55-10-03. Amendment by board of directors and shareholders.

(a) A corporation's board of directors may propose one or more amendments to the articles of incorporation for submission to the shareholders.

(b) For the amendment to be adopted:

(1) The board of directors must recommend the amendment to the shareholders unless the board of directors determines that because of conflict of interest or other special circumstances it should make no recommendation, in which event the board of directors must communicate the basis for its lack of a recommendation to the shareholders with the amendment; and

(2) The shareholders entitled to vote on the amendment must approve the amendment as provided in subsection (e).

(c) The board of directors may condition its submission of the proposed amendment on any basis.

(d) The corporation shall notify each shareholder entitled to vote of the proposed shareholders' meeting in accordance with G.S. 55-7-05. The notice of meeting must state that the purpose, or one of the purposes, of the meeting is to consider the proposed amendment and contain or be accompanied by a copy or summary of the amendment.

(e) Unless this Chapter, the articles of incorporation, a bylaw adopted by the shareholders, or the board of directors (acting pursuant to subsection (c)) require a greater vote or a vote by voting groups, the amendment to be adopted must be approved by:

(1) A majority of the votes entitled to be cast on the amendment by any voting group with respect to which the amendment would create dissenters' rights; and

(2) The votes required by G.S. 55-7-25 and G.S. 55-7-26 by every other voting group entitled to vote on the amendment. (1893, c. 380; 1899, c. 618; 1901, c. 2, ss. 28, 29, 30, 37; 1903, c. 510; Rev., ss. 1174, 1175, 1178; C.S., ss. 1130, 1131; 1925, c. 118, ss. 1, 2a; 1927, c. 142; 1931, c. 243, ss. 4,

5; 1933, c. 100, ss. 7, 8; 1941, c. 97, s. 5; G.S., ss. 55-30, 55-31; 1953, c. 54; c. 119, ss. 1, 2; 1955, c. 1371, s. 1; 1959, c. 1316, s. 25; 1973, c. 469, s. 30; 1989, c. 265, s. 1; 1991, c. 645, s. 8.)

**Effect of Amendments.** — The 1991 amendment, effective October 1, 1991, inserted "a bylaw adopted by the shareholders" in subsection (e).

## § 55-10-05. Amendment before issuance of shares.

If a corporation has not yet issued shares, the board of directors, or if the corporation has no directors, a majority of the incorporators may adopt one or more amendments to the corporation's articles of incorporation. (1893, c. 380; 1899, c. 618; 1901, c. 2, ss. 28, 29, 30, 37; 1903, c. 510; Rev., ss. 1174, 1175, 1178; C.S., ss. 1130, 1131; 1925, c. 118, ss. 1, 2a; 1927, c. 142; 1931, c. 243, ss. 4, 5; 1933, c. 100, ss. 7, 8; 1941, c. 97, s. 5; G.S., ss. 55-30, 55-31; 1953, c. 54; c. 119, ss. 1, 2; 1955, c. 1371, s. 1; 1959, c. 1316, s. 25; 1973, c. 469, s. 30; 1989, c. 265, s. 1; 1991, c. 645, s. 9.)

**Effect of Amendments.** — The 1991 amendment, effective October 1, 1991, substituted "the board of directors, or if the corporation has no directors, a majority of the incorporators" for "its incorporators or board of directors".

## § 55-10-06. Articles of amendment.

A corporation amending its articles of incorporation shall deliver to the Secretary of State for filing articles of amendment setting forth:

(1) The name of the corporation;
(2) The text of each amendment adopted;
(3) If an amendment provides for an exchange, reclassification, or cancellation of issued shares, provisions for implementing the amendment if not contained in the amendment itself;
(4) The date of each amendment's adoption;
(5) If an amendment was adopted by the incorporators or board of directors without shareholder action, a statement to that effect and a brief explanation of why shareholder action was not required;
(6) If an amendment was approved by the shareholders, a statement that shareholder approval was obtained as required by this Chapter. (1955, c. 1371, s. 1; 1959, c. 1316, s. 32; 1989, c. 265, s. 1; 1991, c. 645, s. 10(a).)

**Effect of Amendments.** — The 1991 amendment, effective October 1, 1991, substituted "a brief explanation of why" for "that" in subdivision (5) and rewrote subdivision (6).

## § 55-10-07. Restated articles of incorporation.

(a) A corporation's board of directors may restate its articles of incorporation at any time with or without shareholder action.

(b) The restated articles of incorporation may include one or more amendments to the articles. If the restated articles of incorporation include an amendment requiring shareholder approval, it must be adopted as provided in G.S. 55-10-03. The restated articles of incorporation may include a statement of the address of the current registered office and the name of the current registered agent of the corporation, and no other.

(c) If the board of directors submits restated articles of incorporation for shareholder action, the corporation shall notify each shareholder entitled to vote, of the proposed shareholders' meeting in accordance with G.S. 55-7-05. The notice must also (i) state that the purpose, or one of the purposes, of the meeting is to consider the proposed restated articles of incorporation, (ii) contain or be accompanied by a copy of the proposed restated articles of incorporation, and (iii) identify any amendment or other change they would make in the articles.

(d) A corporation restating its articles of incorporation shall deliver to the Secretary of State for filing articles of restatement which shall:

(1) Set forth the name of the corporation;

(2) Attach as an exhibit thereto the text of the restated articles of incorporation;

(3) State whether the restated articles of incorporation contain an amendment to the articles requiring shareholder approval and, if they do not, that the board of directors adopted the restated articles of incorporation; and

(4) If the restated articles of incorporation contain an amendment to the articles requiring shareholder approval, state that shareholder approval was obtained as required by this Chapter.

(e) Duly adopted restated articles of incorporation supersede the original articles of incorporation and all amendments to them.

(f) The Secretary of State may certify restated articles of incorporation, as the articles of incorporation currently in effect, without including the other information required by subsection (d). (1955, c. 1371, s. 1; 1989, c. 265, s. 1; 1991, c. 645, ss. 11, 18.)

**Effect of Amendments.** — The 1991 amendment, effective October 1, 1991, added the last sentence of subsection (b), and substituted "state that shareholder approval was obtained as required by this Chapter" for "set forth the information required by G.S. 55-10-06" in subdivision (d)(4).

## Part 2. Amendment of Bylaws.

### § 55-10-20. Amendment by board of directors or shareholders.

**Legal Periodicals. — For article discussing shareholder voting rights, see 71** N.C.L. Rev. 1 (1992).

## ARTICLE 11.

## *Merger and Share Exchange.*

### § 55-11-03. Action on plan.

(a) After adopting a plan of merger or share exchange, the board of directors of each corporation party to the merger, and the board of directors of the corporation whose shares will be acquired in the share exchange, shall submit the plan of merger (except as provided in subsection (g)) or share exchange for approval by its shareholders.

(b) For a plan of merger or share exchange to be approved:

(1) The board of directors must recommend the plan of merger or share exchange to the shareholders, unless the board of directors determines that because of conflict of interest or other special circumstances it should make no recommendation, in which event the board of directors must communicate the basis for its lack of a recommendation to the shareholders with the plan; and

(2) The shareholders entitled to vote must approve the plan.

(c) The board of directors may condition its submission of the proposed merger or share exchange on any basis.

(d) The corporation shall notify each shareholder, whether or not entitled to vote, of the proposed shareholders' meeting in accordance with G.S. 55-7-05. The notice must state that the purpose, or one of the purposes, of the meeting is to consider the plan of merger or share exchange and contain or be accompanied by a copy or summary of the plan.

(e) Unless this Chapter, the articles of incorporation, a bylaw adopted by the shareholders or the board of directors (acting pursuant to subsection (c)) require a greater vote or a vote by voting groups, the plan of merger or share exchange to be authorized must be approved by each voting group entitled to vote separately on the plan by a majority of all the votes entitled to be cast on the plan by that voting group and, for the purpose of Article 9 or any provision in the articles of incorporation or bylaws adopted prior to July 1, 1990, a merger shall be deemed to include a share exchange.

(f) Separate voting by voting groups is required:

(1) On a plan of merger if the plan contains a provision that, if contained in a proposed amendment to articles of incorporation, would require action by one or more separate voting groups on the proposed amendment under G.S. 55-10-04, except where the consideration to be received in

exchange for the shares of that group consists solely of cash;

(2) On a plan of share exchange by each class or series of shares to be acquired in the exchange, with each class or series constituting a separate voting group.

(g) Action by the shareholders of the surviving corporation on a plan of merger is not required if:

(1) The articles of incorporation of the surviving corporation will not differ (except for amendments enumerated in G.S. 55-10-02) from its articles before the merger;

(2) Each shareholder of the surviving corporation whose shares were outstanding immediately before the effective date of the merger will hold the same shares, with identical designations, preferences, limitations, and relative rights, immediately after the effective date of the merger;

(3) The number of voting shares outstanding immediately after the merger, plus the number of voting shares issuable as a result of the merger (either by the conversion of securities issued pursuant to the merger or the exercise of rights and warrants issued pursuant to the merger), will not exceed by more than twenty percent (20%) the total number of voting shares of the surviving corporation outstanding immediately before the merger; and

(4) The number of participating shares outstanding immediately after the merger, plus the number of participating shares issuable as a result of the merger (either by the conversion of securities issued pursuant to the merger or the exercise of rights and warrants issued pursuant to the merger), will not exceed by more than twenty percent (20%) the total number of participating shares outstanding immediately before the merger.

(h) As used in subsection (g):

(1) "Participating shares" means shares that entitle their holders to participate without limitation in distributions.

(2) "Voting shares" means shares that entitle their holders to vote unconditionally in elections of directors.

(i) After a merger or share exchange is authorized, and at any time before articles of merger or share exchange are filed, the planned merger or share exchange may be abandoned (subject to any contractual rights), without further shareholder action, in accordance with the procedure set forth in the plan of merger or share exchange or, if none is set forth, in the manner determined by the board of directors. (1925, c. 77, s. 1; 1939, c. 5; 1943, c. 270; G.S., s. 55-165; 1955, c. 1371, s. 1; 1959, c. 1316, s. 37; 1973, c. 469, s. 33; 1989, c. 265, s. 1; 1989 (Reg. Sess., 1990), c. 1024, s. 12.17; 1993, c. 552, s. 14.)

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This section essentially follows the same pattern as former G.S. 55-108 and 55-108.1, except it does not carry forward the provision in former G.S. 55-108(b) allowing nonvoting shareholders to vote on mergers. However, the corporation must give nonvoting shareholders notice of the proposed shareholders' meeting so that they can act if their rights will be adversely affected. The Model Act's requirement that notice be given to nonvoting shareholders was retained in this section, in contrast to G.S. 55-10-03, involving shareholders' meetings to consider amendments to the articles of incorporation, because a proposed merger or share exchange is a fundamental change, whereas most amendments to the articles of incorporation are not. It should be noted that the last sentence in the first section of the Official Comment is not correct for this Act. That sentence indicates that nonvoting shareholders have no right to dissent and obtain payment for their shares in a merger or share exchange. G.S. 55-13-02(a)(1) and (2) give nonvoting shareholders this right.

The Model Act was modified in subsection (b) to conform to changes made in G.S. 55-10-03.

The Model Act was modified in subsection (e) by inserting between the word "incorporation" and the word "or" the words "a bylaw adopted by the shareholders." This modification continues the existing concept of allowing a bylaw adopted by the shareholders to impose a higher quorum or voting requirement. The subsection was further amended by inserting at the end a clause providing that for purposes of Article 9 or already existing provisions in articles of incorporation or bylaws, a "merger" includes a share exchange.

Subdivision 11.03(f)(1) of the Model Act requires voting by voting groups on a plan of merger if the plan contains a provision that "if contained in a proposed amendment to articles of incorporation, would require action by one or more separate voting groups on the proposed amendment." Under this provision, voting by voting groups may be required for one or more classes or series of shares of the surviving corporation as well as for one or more classes or series of the disappearing corporation. This provision was modified in subdivision (f)(1) to create an exception where the consideration to be received in exchange for the shares of the voting group consists solely of cash.

The Model Act was modified in subdivision (f)(2) by substituting "to be acquired" for "included."

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**Effect of Amendments.** — The 1989 (Reg. Sess., 1990) amendment, effective July 1, 1990, substituted "to be acquired" for "included" in subdivision (f)(2).

The 1993 amendment, effective October 1, 1993, in subdivision (g)(2) deleted "number of" preceding the second occurrence of "shares".

## § 55-11-05. Articles of merger or share exchange.

(a) After a plan of merger or share exchange is approved by the shareholders, or adopted by the board of directors if shareholder approval is not required, the surviving or acquiring corporation shall deliver to the Secretary of State for filing articles of merger or share exchange setting forth:

(1) The plan of merger or share exchange;

(2) If shareholder approval was not required, a statement to that effect;

(3) If approval of the shareholders of one or more corporations party to the merger or share exchange was required, a statement that the merger or share exchange was approved by the shareholders as required by this Chapter.

(b) A merger or share exchange takes effect upon the effective date of the articles of merger or share exchange.

(c) Certificates of merger shall also be registered as provided in G.S. 47-18.1. (1925, c. 77, s. 1; 1939, c. 5; 1943, c. 270; G.S., s. 55-165; 1955, c. 1371, s. 1; 1967, c. 823, s. 18; 1973, c. 469, s. 34; 1989, c. 265, s. 1; 1991, c. 645, s. 10(b).)

**Effect of Amendments.** — The 1991 amendment, effective October 1, 1991, rewrote subdivision (a)(3).

# ARTICLE 13.

# *Dissenters' Rights.*

## Part 1. Right to Dissent and Obtain Payment for Shares.

### § 55-13-01. Definitions.

**Legal Periodicals.** — For article, "The Exclusivity of the Appraisal Remedy Under the New North Carolina Business Corporation Act: Deciding the Standard of Review for Cash-Out Mergers," see 69 N.C.L. Rev. 501 (1991).

### § 55-13-02. Right to dissent.

(a) In addition to any rights granted under Article 9, a shareholder is entitled to dissent from, and obtain payment of the fair value of his shares in the event of, any of the following corporate actions:

(1) Consummation of a plan of merger to which the corporation (other than a parent corporation in a merger under G.S. 55-11-04) is a party unless (i) approval by the shareholders of that corporation is not required under G.S. 55-11-03(g) or (ii) such shares are then redeemable by the corporation at a price not greater than the cash to be received in exchange for such shares;

(2) Consummation of a plan of share exchange to which the corporation is a party as the corporation whose shares will be acquired, unless such shares are then redeemable by the corporation at a price not greater than the cash to be received in exchange for such shares;

(3) Consummation of a sale or exchange of all, or substantially all, of the property of the corporation other than as permitted by G.S. 55-12-01, including a sale in dissolution, but not including a sale pursuant to court order or a sale pursuant to a plan by which all or substantially all of the net proceeds of the sale will be distributed in cash to the shareholders within one year after the date of sale;

(4) An amendment of the articles of incorporation that materially and adversely affects rights in respect of a dissenter's shares because it (i) alters or abolishes a preferential right of the shares; (ii) creates, alters, or abolishes a right in respect of redemption, including a provision respecting a sinking fund for the redemption or repurchase, of the shares; (iii) alters or abolishes a preemptive right of the holder of the shares to acquire shares or other securities; (iv) excludes or limits the right of the shares to vote on any matter, or to cumulate votes; (v) reduces the number of shares owned by the shareholder to a fraction of a share if the fractional share so created is to be acquired for cash under G.S. 55-6-04; or (vi) changes the corporation into a nonprofit corporation or cooperative organization;

(5) Any corporate action taken pursuant to a shareholder vote to the extent the articles of incorporation, bylaws, or a

resolution of the board of directors provides that voting or nonvoting shareholders are entitled to dissent and obtain payment for their shares.

(b) A shareholder entitled to dissent and obtain payment for his shares under this Article may not challenge the corporate action creating his entitlement, including without limitation a merger solely or partly in exchange for cash or other property, unless the action is unlawful or fraudulent with respect to the shareholder or the corporation. (1925, c. 77, s. 1; c. 235; 1929, c. 269; 1939, c. 279; 1943, c. 270; G.S., ss. 55-26, 55-167; 1955, c. 1371, s. 1; 1959, c. 1316, ss. 30, 31; 1969, c. 751, ss. 36, 39; 1973, c. 469, ss. 36, 37; c. 476, s. 193; 1989, c. 265, s. 1; 1989 (Reg. Sess., 1990), c. 1024, s. 12.18; 1991, c. 645, s. 12.)

## AMENDED NORTH CAROLINA COMMENTARY

Subdivisions (a)(1), (a)(2), and (a)(3) give a right of dissent for all shares, whether voting or nonvoting, in the case of a merger or sale or exchange of assets; the corresponding provisions in the Model Act give the right of dissent only to voting shareholders.

The right of dissent under this section, however, does not apply in a merger to shares of a corporation when approval by the shareholders of that corporation is not required under G.S. 55-11-03(g) or to shares of a parent corporation in a merger under G.S. 55-11-04. In addition, the right of dissent does not apply in a merger or share exchange to shares that are redeemable by the corporation at the time of the transaction at a price not greater than the cash to be received in exchange for such shares. The Model Act was modified in clause (i) of subdivision (a)(1) to clarify that the absence of a right of dissent applies only to the shares of the corporation covered by G.S. 55-11-03(g) and not to shares of a corporation if approval by its shareholders is required.

The Model Act was also modified in subdivision (a)(3) to provide that a right of dissent will not be available if the sale of property is pursuant to a plan by which all or substantially all of the net proceeds of the sale will be distributed in cash to the shareholders within one year after the date of the sale. This is different from the Model Act, which requires the sale itself to be in cash. This subdivision thus allows more flexibility in permitting, for example, the sale to be for promissory notes or other property that will be converted to cash for distribution within the one-year period.

The language of the Model Act which excepts from the operation of the section "a limitation by dilution through issuance of shares or other securities with similar voting rights" was eliminated from the end of clause (iv) of subdivision (a)(4). The only reason for this elimination was the drafters' opinion that the language is unnecessary; if it were necessary, it should also have been added to the end of G.S. 55-10-04(a)(4).

Clause (vi) of subdivision (a)(4), which is not in the Model Act, brings forward the same provisions in former G.S. 55-101(b). However, the drafters decided not to bring forward the unusual provision in former G.S. 55-102(a) that gave a right of dissent to the holders of any class of preferred shares with dividend arrearages if the corporation offered to exchange such shares for shares with a prior preference and that offer was accepted by any of the preferred shareholders. Such a situation may be covered by clause (i) of subdivision (a)(4).

The introductory language of subsection 13.02(a) of the Model Act was modified to provide that the rights provided by this section are in addition to any rights provided by Article 9.

By making the appraisal remedy exclusive unless the transaction is "unlawful" or "fraudulent," subsection (b) effects a change from former G.S. 55-113(b), which provided that such remedy was "in addition to any other right [the shareholder] may have in law or in equity."

Language was added to the Model Act provision to make it clear that subsection (b) covers a cash merger and that, in determining whether a merger was "unlawful" or "fraudulent," the same standard applies, regardless of whether the consideration received was cash, other property, or shares of a surviving corporation.

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**Effect of Amendments.** — The 1989 (Reg. Sess., 1990) amendment, effective July 1, 1990, inserted "(other than a parent corporation in a merger under G.S. 55-11-04)" in subdivision (a)(1).

The 1991 amendment, effective October 1, 1991, substituted "as permitted by G.S. 55-12-01" for "in the usual and regular course of business" in subdivision (a)(3).

**Legal Periodicals.** —
For article, "The Exclusivity of the Appraisal Remedy Under the New North Carolina Business Corporation Act: Deciding the Standard of Review for Cash-Out Mergers," see 69 N.C.L. Rev. 501 (1991).

## CASE NOTES

**A statutory appraisal is shareholder's exclusive remedy** to redress what the minority shareholders perceived to be as an inadequate price for their shares. IRA ex rel. Oppenheimer v. Brenner Cos., 107 N.C. App. 16, 419 S.E.2d 354, cert. denied, 332 N.C. 666, 424 S.E.2d 401 (1992).

**A statutory appraisal is not a dissenting shareholder's exclusive remedy when** the shareholder has presented claims of breach of fiduciary duty, fraud, self-dealing, securities violations, or similar claims based on allegations other than solely the inadequacy of the stock price. IRA ex rel. Oppenheimer v. Brenner Cos., 107 N.C. App. 16, 419 S.E.2d 354, cert. denied, 332 N.C. 666, 424 S.E.2d 401 (1992).

**When Statutory Appraisal is Appropriate Remedy.** — A statutory appraisal is a dissenting shareholder's exclusive remedy when the shareholder challenges only the fair value or price of the stock. IRA ex rel. Oppenheimer v. Brenner Cos., 107 N.C. App. 16, 419 S.E.2d 354, cert. denied, 332 N.C. 666, 424 S.E.2d 401 (1992).

**Exclusivity of Shareholder's Remedy.** — Subsection (b) of this section now establishes the exclusivity of a dissenting shareholder's remedy in challenging a corporation's actions. The remedy is the exclusive remedy unless the transaction is unlawful or fraudulent. IRA ex rel. Oppenheimer v. Brenner Cos., 107 N.C. App. 16, 419 S.E.2d 354, cert. denied, 332 N.C. 666, 424 S.E.2d 401 (1992).

**Plaintiffs in derivative shareholders' action were not required to pursue statutory dissenters' rights** under former § 55-113 (see now Art. 13 of ch. 55) to oppose merger during litigation in order to maintain standing. Subdivision (c) of former § 55-113 would have deprived them of all interest in defendant corporation. Alford v. Shaw, 327 N.C. 526, 398 S.E.2d 445 (1990).

## Part 2. Procedure for Exercise of Dissenters' Rights.

# § 55-13-20. Notice of dissenters' rights.

**Legal Periodicals.** — For article, "The Exclusivity of the Appraisal Remedy Under the New North Carolina Business Corporation Act: Deciding the Standard of Review for Cash-Out Mergers," see 69 N.C.L. Rev. 501 (1991).

## ARTICLE 14.

## *Dissolution.*

## Part 1. Voluntary Dissolution.

### § 55-14-01. Dissolution by incorporators or directors.

(a) The board of directors or, if the corporation has no directors, a majority of the incorporators of a corporation that has not issued shares may dissolve the corporation by delivering to the Secretary of State for filing articles of dissolution that set forth:

(1) The name of the corporation;
(1a) The names and addresses of its officers, if any;
(1b) The names and addresses of its directors, if any, or if none, the names and addresses of its incorporators;
(2) The date of its incorporation;
(3) That none of the corporation's shares has been issued;
(4) That no debt of the corporation remains unpaid;
(5) Reserved for future codification purposes; and
(6) That a majority of the incorporators or the board of directors authorized the dissolution.

(b) A corporation is dissolved upon the effective date of its articles of dissolution. (1955, c. 1371, s. 1; 1959, c. 1316, s. 26½; 1989, c. 265, s. 1; 1989 (Reg. Sess., 1990), c. 1024, s. 12.19.)

#### AMENDED NORTH CAROLINA COMMENTARY

This section modifies the Model Act in that dissolution by the directors or incorporators is authorized only in the case of a corporation that has not issued shares. In addition, the incorporators are authorized to act only if the corporation has no directors, and the articles of dissolution must identify the officers and directors or, if none, the incorporators.

Subsection (b) was added for clarification; it parallels G.S. 55-14-03(b).

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**Effect of Amendments.** — The 1989 (Reg. Sess., 1990) amendment, effective July 1, 1990, in subdivision (a)(6), substituted "the board of directors" for "initial directors."

### § 55-14-03. Articles of dissolution.

(a) At any time after dissolution is authorized pursuant to G.S. 55-14-02, the corporation may dissolve by delivering to the Secretary of State for filing articles of dissolution setting forth:

(1) The name of the corporation;
(1a) The names and addresses of its officers;
(1b) The names and addresses of its directors;
(2) The date dissolution was authorized;
(3) A statement that shareholder approval was obtained as required by this Chapter.
(4) Repealed by Session Laws 1991, c. 645, s. 10(c), effective October 1, 1991.

(b) A corporation is dissolved upon the effective date of its articles of dissolution. (1901, c. 2, s. 34; Rev., s. 1195; C.S., s. 1182; 1941, c. 195; G.S., s. 55-121; 1951, c. 1005, s. 4; 1955, c. 1371, s. 1; 1989, c. 265, s. 1; 1991, c. 645, s. 10(c).)

**Effect of Amendments.** — The 1991 amendment, effective October 1, 1991, rewrote subdivision (a)(3), and repealed subdivision (a)(4), relating to provision of separate information to each voting group when voting by voting groups was required.

CASE NOTES

**Cited** in Storr Office Supply Div. v. Radar Bus. Sys., 832 F. Supp. 154 (E.D.N.C. 1993).

## § 55-14-05. Effect of dissolution.

CASE NOTES

**Dissolution does not terminate the corporation's existence nor its amenability to suit.** Baker v. Rushing, 104 N.C. App. 240, 409 S.E.2d 108 (1991).

**Acquisition of New Property Not Incident to Winding Up.** — While former § 55-114(b) provided that a dissolved corporation continued to function for the limited purpose of winding up its affairs, the acquisition of new property was not incident to the winding up process. Piedmont & W. Inv. Corp. v. Carnes-Miller Gear Co., 96 N.C. App. 105, 384 S.E.2d 687 (1989), motion to amend petition for discretionary review granted, 326 N.C. 49, 389 S.E.2d 93 (1990).

**Applied** in Storr Office Supply Div. v. Radar Bus. Sys., 832 F. Supp. 154 (E.D.N.C. 1993).

**Cited** in Foster v. Foster Farms, Inc., 112 N.C. App. 700, 436 S.E.2d 843 (1993).

## § 55-14-06. Known claims against dissolved corporation.

CASE NOTES

**Cited** in Foster v. Foster Farms, Inc., 112 N.C. App. 700, 436 S.E.2d 843 (1993).

### Part 2. Administrative Dissolution.

## § 55-14-20. Grounds for administrative dissolution.

The Secretary of State may commence a proceeding under G.S. 55-14-21 to dissolve administratively a corporation if:

(1) The corporation does not pay within 60 days after they are due any penalties, fees, or other payments due under this Chapter;

(2) The corporation does not deliver its annual report to the Secretary of State within 60 days after it is due;

(3) The corporation is without a registered agent or registered office in this State for 60 days or more;

(4) The corporation does not notify the Secretary of State within 60 days that its registered agent or registered office has been changed, that its registered agent has resigned, or that its registered office has been discontinued;

(5) The corporation's period of duration stated in its articles of incorporation expires; or

(6) The corporation knowingly fails or refuses to answer truthfully and fully within the time prescribed in this Chapter interrogatories propounded by the Secretary of State in accordance with the provisions of this Chapter. (1989, c. 265, s. 1; 1993, c. 552, s. 15.)

**Effect of Amendments.** — The 1993 amendment, effective October 1, 1993, in subdivision (4) deleted "or" from the end; added "or" at the end of subdivision (5); and added subdivision (6).

## Part 3. Judicial Dissolution.

### § 55-14-30. Grounds for judicial dissolution.

**Legal Periodicals.** — For note, "Minority Shareholders' Rights in the Close Corporation Under the New North Carolina Business Corporation Act," see 68 N.C.L. Rev. 1109 (1990).

CASE NOTES

**Deadlock in Management of Corporate Affairs.** — Where plaintiff and defendant were the only directors, because they could not agree when the corporation should borrow money, the corporation could not borrow money at all; therefore, there was sufficient evidence to support a finding of deadlock in the management of the corporation's affairs. Foster v. Foster Farms, Inc., 112 N.C. App. 700, 436 S.E.2d 843 (1993).

**Mandatory Buy-Out Rights.** — Mandatory buy-out rights under subsection (d) of § 55-14-30 apply only to dissolutions granted under subdivision (2)(ii) of this section. Foster v. Foster Farms, Inc., 112 N.C. App. 700, 436 S.E.2d 843 (1993).

**Insufficient Grounds for Dissolution.** — Where the trial court failed to make any of the findings required under Meiselman v. Meiselman, 309 N.C. 279, 307 S.E.2d 551 (1983), but simply found that liquidation was reasonably necessary for the protection of the interests of the complaining shareholder, the trial court's findings of fact were not sufficient to support its conclusion that grounds for dissolution existed. Foster v. Foster Farms, Inc., 112 N.C. App. 700, 436 S.E.2d 843 (1993).

**Applied** in Edwards v. Edwards, 110 N.C. App. 1, 428 S.E.2d 834 (1993).

### § 55-14-31. Procedure for judicial dissolution.

**Legal Periodicals.** — For note, "Minority Shareholders' Rights in the Close Corporation Under the New North Carolina Business Corporation Act," see 68 N.C.L. Rev. 1109 (1990).

CASE NOTES

**Mandatory buy-out rights under subsection (d)** of this section apply only to dissolutions granted under subdivision (2)(ii) of § 55-14-30. Foster v. Foster Farms, Inc., 112 N.C. App. 700, 436 S.E.2d 843 (1993).

## § 55-14-33. Decree of dissolution.

### CASE NOTES

**Trial court was not required to hold hearing on valuation** of the corporation's stocks and assets prior to entering its dissolution order as any specific problems regarding implementation of the dissolution order, including valuation of the corporation's assets, can be brought to the attention of the trial court by motion as the problems arise. Foster v. Foster Farms, Inc., 112 N.C. App. 700, 436 S.E.2d 843 (1993).

## ARTICLE 15.

## *Foreign Corporations.*

### Part 1. Certificate of Authority.

## § 55-15-01. Authority to transact business required.

(a) A foreign corporation may not transact business in this State until it obtains a certificate of authority from the Secretary of State.

(b) Without excluding other activities which may not constitute transacting business in this State, a foreign corporation shall not be considered to be transacting business in this State solely for the purposes of this Chapter, by reason of carrying on in this State any one or more of the following activities:

(1) Maintaining or defending any action or suit or any administrative or arbitration proceeding, or effecting the settlement thereof or the settlement of claims or disputes;

(2) Holding meetings of its directors or shareholders or carrying on other activities concerning its internal affairs;

(3) Maintaining bank accounts or borrowing money in this State, with or without security, even if such borrowings are repeated and continuous transactions;

(4) Maintaining offices or agencies for the transfer, exchange, and registration of its securities, or appointing and maintaining trustees or depositories with relation to its securities;

(5) Soliciting or procuring orders, whether by mail or through employees or agents or otherwise, where such orders require acceptance without this State before becoming binding contracts;

(6) Making or investing in loans with or without security including servicing of mortgages or deeds of trust through independent agencies within the State, the conducting of foreclosure proceedings and sale, the acquiring of property at foreclosure sale and the management and rental of such property for a reasonable time while liquidating its investment, provided no office or agency therefor is maintained in this State;

(7) Taking security for or collecting debts due to it or enforcing any rights in property securing the same;

(8) Transacting business in interstate commerce;
(9) Conducting an isolated transaction completed within a period of six months and not in the course of a number of repeated transactions of like nature;
(10) Selling through independent contractors;
(11) Owning, without more, real or personal property.

(c) Reserved for future codification purposes.

(d) Foreign insurance companies that are licensed by the Commissioner of Insurance are not required to obtain a certificate of authority from the Secretary of State. (1901, c. 2, s. 93; Rev., s. 1193; 1915, c. 196, s. 1; C.S., s. 1180; G.S., s. 55-117; 1955, c. 1371, s. 1; 1989, c. 265, s. 1; 1989 (Reg. Sess., 1990), c. 1024, s. 12.20; 1993, c. 552, s. 16.)

### AMENDED NORTH CAROLINA COMMENTARY

The Model Act was modified in subsection (a) by adding the words "under this Chapter or under Chapter 55A of the General Statutes."

The activities listed in the Model Act as not constituting the transaction of business appear to be narrower in certain respects than the activities listed in former G.S. 55-131(b). Subsection (b), which applies solely for purposes of this Act and not for purposes of determining whether there is *in personam* jurisdiction over a foreign corporation, brings forward former G.S. 55-131(b) with the addition of subdivisions 15.01(b)(5) and (9) from the Model Act as subdivisions (b)(10) and (11). The substitution rendered the Model Act's text in subsection 15.01(c) unnecessary, and it was omitted.

Subsection (d) was added to bring forward the provisions of former G.S. 55-131(c) in a revised, clarified version.

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**Effect of Amendments.** — The 1989 (Reg. Sess., 1990) amendment, effective July 1, 1990, added "under this Chapter or under Chapter 55A of the General Statutes" at the end of subsection (a).

The 1993 amendment, effective October 1, 1993, deleted "under this Chapter or under Chapter 55A of the General Statutes" from the end of subsection (a).

## § 55-15-02. Consequences of transacting business without authority.

### CASE NOTES

**Failure to Raise Issue in Pre-Trial Motion.** — Where the evidence showed that defendants were not misled by plaintiff about its possession of a certificate of authority to transact business in North Carolina, defendants' failure to raise the issue of plaintiff's authority to transact business in North Carolina in a motion prior to trial, as required by subsection (a), precluded it from doing so in a motion after trial. Spivey & Self, Inc. v. Highview Farms, Inc., 110 N.C. App. 719, 431 S.E.2d 535, cert. denied, 334 N.C. 623, 435 S.E.2d 342 (1993).

## § 55-15-03. Application for certificate of authority.

(a) A foreign corporation may apply for a certificate of authority to transact business in this State by delivering an application to the Secretary of State for filing. The application must set forth:

(1) The name of the foreign corporation or, if its name is unavailable for use in this State, a corporate name that satisfies the requirements of G.S. 55-15-06;
(2) The name of the state or country under whose law it is incorporated;
(3) Its date of incorporation and period of duration;
(4) The street address, and the mailing address if different from the street address, of its principal office;
(5) The street address, and the mailing address if different from the street address, of its registered office in this State, the county in which the registered office is located, and the name of its registered agent at that office; and
(6) The names and usual business addresses of its current officers.

(b) The foreign corporation shall deliver with the completed application a certificate of existence (or a document of similar import) duly authenticated by the secretary of state or other official having custody of corporate records in the state or country under whose law it is incorporated.

(c) If the Secretary of State finds that the application conforms to law he shall, when all fees have been tendered as prescribed in this Chapter:

(1) Endorse on the application and an exact or conformed copy thereof the word "filed" and the hour, day, month, and year of the filing thereof;
(2) File in his office the application and the certificate of existence (or document of similar import as described in subsection (b) of this section);
(3) Issue a certificate of authority to transact business in this State to which he shall affix the exact or conformed copy of the application; and
(4) Send to the foreign corporation or its representative the certificate of authority, together with the exact or conformed copy of the application affixed thereto. (1901, c. 2, s. 57; 1903, c. 76; Rev., s. 1194; 1915, c. 263; C.S., s. 1181; 1935, c. 44; 1939, c. 57; G.S., s. 55-118; 1953, c. 1152; 1955, c. 1371, s. 1; 1957, c. 979, s. 8; 1969, c. 751, s. 41; 1989, c. 265, s. 1; 1989 (Reg. Sess., 1990), c. 1024, ss. 12.1(b), 12.21.)

### AMENDED NORTH CAROLINA COMMENTARY

This Act does not bring forward the requirement of former G.S. 55-138(a) that a foreign corporation include in its application the purposes it desires to pursue in this State and information with respect to its capital structure. In addition, the application under this Act is submitted with a certificate of existence or good standing rather than the certified charter documents required under former G.S. 55-138.

Subsection (a) was modified to conform to changes from the Model Act in the address requirement made in G.S. 55-2-02 and G.S. 55-5-02.

Subsection (c) brings forward former G.S. 55-139(b) because the Model Act contains no express requirement that the Secretary of State issue a certificate of authority.

**Effect of Amendments.** — The 1989 (Reg. Sess., 1990) amendment, effective July 1, 1990, in subdivision (a)(5), inserted ", the county in which the registered office is located"; and deleted "taxes and" following "when all" in the introductory sentence of subsection (c).

## § 55-15-04. Amended certificate of authority.

(a) A foreign corporation authorized to transact business in this State must obtain an amended certificate of authority from the Secretary of State if it changes:

(1) Its corporate name;
(2) The period of its duration; or
(3) The state or country of its incorporation.

(b) A foreign corporation may apply for an amended certificate of authority by delivering an application to the Secretary of State for filing that sets forth:

(1) The name of the foreign corporation and the name in which the corporation is authorized to transact business in North Carolina if different;
(2) The name of the state or country under whose law it is incorporated;
(3) The date it was originally authorized to transact business in this State;
(4) A statement of the change or changes being made.

Except for the content of the application, the requirements of G.S. 55-15-03 for obtaining an original certificate of authority apply to obtaining an amended certificate under this section. (1955, c. 1371, s. 1; 1989, c. 265, s. 1; 1989 (Reg. Sess., 1990), c. 1024, s. 12.22.)

**Effect of Amendments.** — The 1989 (Reg. Sess., 1990) amendment, effective July 1, 1990, rewrote this section.

## § 55-15-05. Effect of certificate of authority.

(a) A certificate of authority authorizes the foreign corporation to which it is issued to transact business in this State subject, however, to the right of the State to revoke the certificate as provided in this Chapter. A foreign corporation, however, is not eligible or entitled to qualify in this State as executor, administrator, or guardian, or as trustee under the will of any person domiciled in this State at the time of his death, except that a foreign corporation chartered under the banking laws of Georgia, South Carolina, Tennessee or Virginia or as a national banking association in any said states may act as testamentary trustee, or executor in this State if:

(1) It has a bona fide capital of at least two hundred and fifty thousand dollars ($250,000) actually paid in;
(2) It is authorized to act in such fiduciary capacity in the state in which it is incorporated or if such foreign corporation be a national banking association in the state in which it has its principal place of business; and
(3) Any bank or other corporation organized under the laws of this State or a national banking association having its principal place of business in this State is permitted by law to act in such fiduciary capacity in the state in which such

foreign corporation seeking to act in this State is organized or in which it has its principal place of business if it is a national banking association without further showing or qualification other than that it is authorized to act in such fiduciary capacity in this State and upon compliance with the laws of such other state, if any, concerning service of process on nonresident fiduciaries.

Unless assets of the estate are to be removed from within the State of North Carolina, such foreign corporations seeking to act as testamentary trustee, or executor in this State, upon qualifying to act in such fiduciary capacity, shall not be required by law to give bond except as required of a resident corporate fiduciary in like circumstances. No officer, employee or agent of any such foreign corporation shall be eligible or entitled to serve as testamentary trustee, or executor in this State whether such officer, employee, or agent is a resident or nonresident of this State if such officer, employee or agent is acting as testamentary trustee or executor on behalf of any such foreign corporation except when such foreign corporation itself shall be eligible to so serve.

A foreign corporation qualifying as testamentary trustee or executor under the provisions of this section shall appoint a process agent and file such appointment with the court as required by G.S. 28A-4-2(4).

(b) Except as otherwise provided by this Chapter, a foreign corporation with a valid certificate of authority has the same but no greater rights and has the same but no greater privileges as, and is subject to the same duties, restrictions, penalties, and liabilities now or later imposed on, a domestic corporation of like character.

(c) Reserved for future codification purposes. (1901, c. 2, s. 93; Rev., s. 1193; 1915, c. 196, s. 1; C.S., s. 1180; G.S., s. 55-117; 1955, c. 1371, s. 1; 1969, c. 839; 1985, c. 689, s. 25; 1989, c. 265, s. 1.)

**Editor's Note.** — The section above is set out to correct a typographical error in the second sentence of subsection (a).

## § 55-15-06. Corporate name of foreign corporation.

**Editor's Note.** — The phrase "changed named" in subsection (e) of this section as it appears in the main volume should read "changed name."

## § 55-15-08. Change of registered office or registered agent of foreign corporation.

(a) A foreign corporation authorized to transact business in this State may change its registered office or registered agent by delivering to the Secretary of State for filing a statement of change that sets forth:

(1) Its name;

(2) The street address, and the mailing address if different from the street address, of the corporation's current registered office, and the county in which it is located;

(3) If the address of the corporation's registered office is to be changed, the street address, and the mailing address if different from the street address, of the new registered office, and the county in which it is located;

(4) The name of its current registered agent;

(5) If the current registered agent is to be changed, the name of its new registered agent and the new agent's written consent (either on the statement or attached to it) to the appointment; and

(6) That after the change or changes are made, the addresses of its registered office and the business office of its registered agent will be identical.

(b) If a registered agent changes the address of his business office, he may change the address of the registered office of any foreign corporation for which he is the registered agent by notifying the corporation in writing of the change and signing (either manually or in facsimile) and delivering to the Secretary of State for filing a statement of change that complies with the requirements of subsection (a) and recites that the corporation has been notified of the change.

(c) A foreign corporation authorized to transact business in this State may change its registered office or registered agent by including in its annual report required by G.S. 55-16-22 the information and any written consent required by subsection (a) of this section. (1955, c. 1371, s. 1; 1957, c. 979, ss. 9, 10; 1965, c. 298, s. 2; 1989, c. 265, s. 1; 1993, c. 552, s. 17.)

**Effect of Amendments.** — The 1993 amendment, effective October 1, 1993, added subsection (c).

## Part 2. Withdrawal.

### § 55-15-20. Withdrawal of foreign corporation.

(a) A foreign corporation authorized to transact business in this State may not withdraw from this State until it obtains a certificate of withdrawal from the Secretary of State.

(b) A foreign corporation authorized to transact business in this State may apply for a certificate of withdrawal by delivering an application to the Secretary of State for filing. The application must set forth:

(1) The name of the foreign corporation and the name of the state or country under whose law it is incorporated;

(2) That it is not transacting business in this State and that it surrenders its authority to transact business in this State;

(3) That the corporation revokes the authority of its registered agent to accept service of process and consents that service of process in any action or proceeding based upon any cause of action arising in this State, or arising out of business transacted in this State, during the time the corporation was authorized to transact business in this State may thereafter be made on such corporation by service thereof on the Secretary of State;

(4) A mailing address to which the Secretary of State may mail a copy of any process served on him under subdivision (3); and

(5) A commitment to notify the Secretary of State in the future of any change in its mailing address.

(b1) If the Secretary of State finds that such application conforms to law, he shall:

(1) Endorse on the application and an exact or conformed copy thereof the word "filed", and the hour, day, month and year of the filing thereof;

(2) File the application in his office;

(3) Issue a certificate of withdrawal to which he shall affix the exact or conformed copy of the application; and

(4) Send to the foreign corporation or its representative the certificate of withdrawal together with the exact or conformed copy of the application affixed thereto.

(c) After the withdrawal of the corporation is effective, service of process on the Secretary of State in accordance with subsection (b)(3) of this section is service on the foreign corporation. Upon receipt of process, the Secretary of State shall mail a copy of the process to the foreign corporation at the mailing address set forth under subsection (b). (1955, c. 1371, s. 1; 1973, c. 476, s. 193; 1989, c. 265, s. 1; 1989 (Reg. Sess., 1990), c. 1024, s. 12.23.)

### AMENDED NORTH CAROLINA COMMENTARY

This section modifies the Model Act in subdivision (b)(3) to clarify and limit the circumstances under which service of process on the Secretary of State is effective with respect to a foreign corporation that has withdrawn from this State. In addition, former G.S. 55-150(d), modified to conform to G.S. 55-15-03(c), was added as subsection (b1), because the Model Act contains no express requirement that the Secretary of State issue a certificate of withdrawal or send the certificate to the foreign corporation or its representative.

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**Effect of Amendments.** — The 1989 (Reg. Sess., 1990) amendment, effective July 1, 1990, deleted "and" from the end of subdivision (b1)(2), substituted "application; and" for "application" at the end of subdivision (b1)(3), and added subdivision (b1)(4).

## § 55-15-21. Withdrawal of foreign corporation by reason of a merger.

(a) Whenever the separate existence of a foreign corporation authorized to transact business in this State ceases as a result of a statutory merger permitted by the laws of the state or country under which it was incorporated, the surviving corporation shall apply for a certificate of withdrawal for the merged corporation by delivering to the Secretary of State for filing a copy of the articles of merger or a certificate reciting the facts of the merger, duly authenticated by the Secretary of State or other official having custody of corporate records in the state or country under the laws of which such statutory merger was effected. If the surviving corporation is not authorized to transact business in this State the articles of merger or certificate must be accompanied by an application which must set forth:

(1) The name of each merged corporation authorized to transact business in this State and the name of the surviving corporation and a statement that the surviving corporation is not authorized to transact business in this State;

(2) That the surviving corporation consents that service of process based upon any cause of action arising in this State, or arising out of business transacted in this State, during the time each merged corporation was authorized to transact business in this State may thereafter be made on such corporation by service thereof on the Secretary of State;
(3) A mailing address to which the Secretary of State may mail a copy of any process served on him under subdivision (a)(2); and
(4) A commitment to notify the Secretary of State in the future of any change in its mailing address.

(b) If the Secretary of State finds that the articles of merger or certificate and the application for withdrawal, if required, conforms to law he shall:
(1) Endorse on the articles of merger or certificate and the application for withdrawal, if required, the word "filed" and the hour, day, month and year of filing thereof;
(2) File the articles of merger or certificate and the application, if required;
(3) Issue a certificate of withdrawal; and
(4) Send to the foreign corporation or its representative the certificate of withdrawal, together with the exact or conformed copy of the application, if required, affixed thereto. (1991, c. 645, s. 13.)

**Editor's Note.** — Session Laws 1991, c. 645, s. 22 made this section effective October 1, 1991.

**§§ 55-15-22 through 55-15-29:** Reserved for future codification purposes.

## Part 3. Revocation of Certificate of Authority.

### § 55-15-30. Grounds for revocation.

(a) The Secretary of State may commence a proceeding under G.S. 55-15-31 to revoke the certificate of authority of a foreign corporation authorized to transact business in this State if:
(1) The foreign corporation does not deliver its annual report to the Secretary of State within 60 days after it is due;
(2) The foreign corporation does not pay within 60 days after they are due any penalties, fees, or other payments due under this Chapter;
(3) The foreign corporation is without a registered agent or registered office in this State for 60 days or more;
(4) The foreign corporation does not inform the Secretary of State under G.S. 55-15-08 or G.S. 55-15-09 that its registered agent or registered office has changed, that its registered agent has resigned, or that its registered office has been discontinued within 60 days of the change, resignation, or discontinuance;
(5) An incorporator, director, officer, or agent of the foreign corporation signed a document he knew was false in any material respect with intent that the document be delivered to the Secretary of State for filing;

(6) The Secretary of State receives a duly authenticated certificate from the secretary of state or other official having custody of corporate records in the state or country under whose law the foreign corporation is incorporated stating that it has been dissolved or disappeared as the result of a merger;
(7) The corporation is exceeding the authority conferred upon it by this Chapter; or
(8) The corporation knowingly fails or refuses to answer truthfully and fully within the time prescribed in this Chapter interrogatories propounded by the Secretary of State in accordance with the provisions of this Chapter.

(b) Nothing herein shall be deemed to repeal or modify any provision of the Revenue Act relating to the suspension of the certificate of authority of foreign corporations for failure to comply with the provisions thereof. (1955, c. 1371, s. 1; 1989, c. 265, s. 1; 1993, c. 552, s. 18.)

**Effect of Amendments.** — The 1993 amendment, effective October 1, 1993, in subdivision (a)(7) added "or" at the end and added subdivision (a)(8).

## § 55-15-31. Procedure for and effect of revocation.

(a) If the Secretary of State determines that one or more grounds exist under G.S. 55-15-30 for revocation of a certificate of authority, he shall mail to the foreign corporation written notice of his determination.

(b) If the foreign corporation does not correct each ground for revocation or demonstrate to the reasonable satisfaction of the Secretary of State that each ground determined by the Secretary of State does not exist within 60 days after notice is mailed, the Secretary of State may revoke the foreign corporation's certificate of authority by signing a certificate of revocation that recites the ground or grounds for revocation and its effective date. The Secretary of State shall file the original of the certificate and mail a copy to the foreign corporation.

(c) The authority of a foreign corporation to transact business in this State ceases on the date shown on the certificate revoking its certificate of authority.

(d) The Secretary of State's revocation of a foreign corporation's certificate of authority appoints the Secretary of State the foreign corporation's agent for service of process in any proceeding based on a cause of action arising in this State or arising out of business transacted in this State during the time the foreign corporation was authorized to transact business in this State. The Secretary of State shall then proceed in accordance with G.S. 55-15-10.

(e) Revocation of a foreign corporation's certificate of authority does not terminate the authority of the registered agent of the corporation.

(f) The corporation shall not be granted a new certificate of authority until each ground for revocation has been substantially corrected to the reasonable satisfaction of the Secretary of State. (1955, c. 1371, s. 1; 1989, c. 265, s. 1; 1989 (Reg. Sess., 1990), c. 1024, s. 12.24; 1991, c. 645, s. 14.)

**Effect of Amendments.** — The 1989 (Reg. Sess., 1990) amendment, effective July 1, 1990, in the first sentence of subsection (b), substituted "within 60 days" for "with 60 days."

The 1991 amendment, effective October 1, 1991, added subsection (f).

## § 55-15-32. Appeal from revocation.

(a) A foreign corporation may appeal the Secretary of State's revocation of its certificate of authority to the Superior Court of Wake County within 30 days after the certificate of revocation is mailed to the foreign corporation by the Secretary of State. The appeal is commenced by filing a petition with the court and with the Secretary of State requesting the court to set aside the revocation. The petition shall have attached to it copies of the corporation's certificate of authority and the Secretary of State's certificate of revocation. The appeal to the superior court shall be determined upon such further evidence, notice and opportunity to be heard, if any, as the court may deem appropriate under the circumstances. The foreign corporation shall have the burden of establishing that it is entitled to have the revocation set aside.

(b) Upon consideration of the petition and any response made by the Secretary of State, the court may, prior to entering final judgment, order the Secretary of State to set aside the revocation or may take any other action the court considers appropriate.

(c) The court's final decision may be appealed as in other civil proceedings. (1989, c. 265, s. 1; 1989 (Reg. Sess., 1990), c. 1024, s. 12.25.)

**Effect of Amendments.** — The 1989 (Reg. Sess., 1990) amendment, effective July 1, 1990, in the first sentence of subsection (a), deleted "service of" preceding "the certification of revocation," and added "to the foreign corporation by the Secretary of State" to the end of the sentence.

# ARTICLE 16.

# *Records and Reports.*

## Part 1. Records.

## § 55-16-01. Corporate records.

### CASE NOTES

**Stated** in Parsons v. Jefferson-Pilot Corp., 106 N.C. App. 307, 416 S.E.2d 914 (1992).

## § 55-16-02. Inspection of records by shareholders.

(a) A qualified shareholder of a corporation is entitled to inspect and copy, during regular business hours at the corporation's principal office, any of the records of the corporation described in G.S. 55-16-01(e) if he gives the corporation written notice of his demand at least five business days before the date on which he wishes to inspect and copy.

(b) A qualified shareholder of a corporation is entitled to inspect and copy, during regular business hours at a reasonable location specified by the corporation, any of the following records of the corporation if the shareholder meets the requirements of subsection (c) and gives the corporation written notice of his demand at least five business days before the date on which he wishes to inspect and copy:

(1) Records of any final action taken with or without a meeting by the board of directors, or by a committee of the board of directors while acting in place of the board of directors on behalf of the corporation, minutes of any meeting of the shareholders and records of action taken by the shareholders without a meeting, to the extent not subject to inspection under G.S. 55-16-02(a);

(2) Accounting records of the corporation; and

(3) The record of shareholders;

provided that a shareholder of a public corporation shall not be entitled to inspect or copy any accounting records of the corporation or any records of the corporation with respect to any matter which the corporation determines in good faith may, if disclosed, adversely affect the corporation in the conduct of its business or may constitute material nonpublic information at the time the shareholder's notice of demand to inspect and copy is received by the corporation.

(c) A qualified shareholder may inspect and copy the records described in subsection (b) only if:

(1) His demand is made in good faith and for a proper purpose;

(2) He describes with reasonable particularity his purpose and the records he desires to inspect; and

(3) The records are directly connected with his purpose.

(d) The right of inspection granted by this section may not be abolished or limited by a corporation's articles of incorporation or bylaws.

(e) This section does not affect:

(1) The right of a shareholder to inspect records under G.S. 55-7-20 or, if the shareholder is in litigation with the corporation, to inspect the records to the same extent as any other litigant;

(2) The power of a court, independently of this Chapter, to compel the production of corporate records for examination.

(f) For purposes of this section, "shareholder" includes a beneficial owner whose shares are held in a voting trust or by a nominee on his behalf and whose beneficial ownership is certified to the corporation by that voting trust or nominee.

(g) For purposes of this section a "qualified shareholder" of a corporation is a person who shall have been a shareholder in the corporation for at least six months immediately preceding his demand or who shall be the holder of at least five percent (5%) of the corporation's outstanding shares of any class.

(h) A qualified shareholder of a corporation that has the power to elect, appoint, or designate a majority of the directors of another domestic or foreign corporation or of a domestic or foreign nonprofit corporation, shall have the inspection rights provided in this section with respect to the records of that other corporation.

(i) Notwithstanding the provisions of this section or any other provisions of this Chapter or interpretations thereof to the contrary, a shareholder of a public corporation shall have no common law rights to inspect or copy any accounting records of the corporation or any other records of the corporation that may not be inspected or copied by a shareholder of a public corporation as provided in G.S. 55-16-02(b). (1901, c. 2, ss. 38, 45, 49; Rev., ss. 1179-1181; C.S., ss. 1170, 1172; G.S., ss. 55-107, 55-109; 1955, c. 1371, s. 1; 1965, c. 609; 1973, c. 469, s. 11; 1989, c. 265, s. 1; 1989 (Reg. Sess., 1990), c. 1024, s. 12.26; 1993, c. 552, s. 19.)

**Effect of Amendments.** — The 1989 (Reg. Sess., 1990) amendment, effective July 1, 1990, in subdivision (b)(1) inserted "with or without a meeting" following "final action taken," deleted a comma following "meeting of the shareholders," and deleted "or board of directors" following "action taken by the shareholders."

The 1993 amendment, effective October 1, 1993, added subsections (h) and (i).

## CASE NOTES

**Considerations.** — To determine whether a shareholder's demand to inspect corporate records meets the requirements of subsection (c) of this section, the trial court must focus upon the demand itself, not upon the shareholder's subsequent pleadings or motions filed in an attempt to compel inspection under G.S. § 55-16-04(b). Parsons v. Jefferson-Pilot Corp., 106 N.C. App. 307, 416 S.E.2d 914 (1992), aff'd in part and rev'd in part, 333 N.C. 420, 426 S.E.2d 685 (1993).

**A beneficial owner of shares is a "shareholder" within the meaning of subdivision (b)(3) when** the corporation has obtained a NOBO (non-objecting beneficial owners) list pursuant to 17 C.F.R. § 240.14b-1(c) listing that owner, or when there is a nominee certificate regarding that owner on file with the corporation. Parsons v. Jefferson-Pilot Corp., 106 N.C. App. 307, 416 S.E.2d 914 (1992), aff'd in part and rev'd in part, 333 N.C. 420, 426 S.E.2d 685 (1993).

**Non-objecting beneficial owners who had not filed nominee certificates were not "shareholders"** within the meaning of subdivision (b)(3) of this section, and corporation did not have an obligation to obtain and make available to shareholder a list of their names. Parsons v. Jefferson-Pilot Corp., 106 N.C. App. 307, 416 S.E.2d 914 (1992), aff'd in part and rev'd in part, 333 N.C. 420, 426 S.E.2d 685 (1993).

**Proper Purpose.** — Where shareholder demanded to inspect corporate records to determine "any possible mismanagement of the Company or any possible misappropriation, misapplication or improper use of any property or asset of the Company," shareholder's stated purpose was proper under subdivision (c)(1) of this section. Parsons v. Jefferson-Pilot Corp., 106 N.C. App. 307, 416 S.E.2d 914 (1992), aff'd in part and rev'd in part, 333 N.C. 420, 426 S.E.2d 685 (1993).

## Part 2. Reports.

### § 55-16-22. Annual report for Secretary of State.

(a) Each domestic corporation except those governed by Chapter 55B, and each foreign corporation authorized to transact business in this State, shall deliver to the Secretary of State for filing an annual report that sets forth:

(1) The name of the corporation and the state or country under whose law it is incorporated;

(2) The street address, and the mailing address if different from the street address, of the registered office, the county in which its registered office is located, and the name of its registered agent at that office in this State, and a statement of any change of such registered office or registered agent, or both;

(3) The address of its principal office;

(4) The names, titles, and business addresses of its principal officers;

(4a) The names and business addresses of its directors; and

(5) A brief description of the nature of its business.

(b) Information in the annual report must be current as of the date the annual report is executed on behalf of the corporation.

(c) The annual report shall be delivered to the Secretary of State each year within 60 days immediately following the last day of the month in which the domestic corporation was incorporated or the foreign corporation received a certificate of authority in this State. Forms required for the filing of the annual report shall be mailed by the Secretary of State to the domestic or foreign corporation at its registered office for the first annual report, then to its principal office for subsequent annual reports.

(d) If an annual report does not contain the information required by this section, the Secretary of State shall promptly notify the reporting domestic or foreign corporation in writing and return the report to it for correction. If the report is corrected to contain the information required by this section and delivered to the Secretary of State within 30 days after the effective date of notice, it is deemed to be timely filed.

(e) Amendments to any previously filed annual report may be filed at any time for the purpose of correcting, updating, or augmenting the information contained in such annual report.

(f) Expired. (1989, c. 265, s. 1; 1989 (Reg. Sess., 1990), c. 1066, s. 32(a); 1993, c. 218, s. 2.)

**Editor's Note.** — Session Laws 1989, c. 265, s. 3, as amended by Session Laws 1989 (Reg. Sess., 1990), c. 1066, s. 32(a), made this section effective January 1, 1991.

Subsection (f) of this section, concerning filing of the annual report before or after administrative dissolution or revocation of certificate of authority, has not been set out, as having expired July 1, 1994, pursuant to the terms of Session Laws 1993, c. 218, s. 2.

Session Laws 1993 (Reg. Sess., 1994), c. 769, in s. 9.2, provides that the Legislative Research Commission may study whether the requirement under G.S. 55-16-22 that a corporation file an annual report with the Secretary of State should be modified, and appropriates the sum of $25,000 to conduct the study.

Session Laws 1993 (Reg. Sess., 1994), c. 769, s. 2 provides: "This act shall be known as 'The Current Operations and Capital Improvements Appropriations Act of 1994.'"

Session Laws 1993 (Reg. Sess., 1994),

c. 769, s. 43.2 provides: "Except for statutory changes or other provisions that clearly indicate an intention to have effects beyond the 1994-95 fiscal year, the textual provisions of this act apply only to funds appropriated for, and activities occurring during, the 1994-95 fiscal year."

**Effect of Amendments.** — The 1993 amendment, effective upon ratification, June 28, 1993, added subsection (f). For expiration of this amendment, see the Editor's note.

## ARTICLE 17.

## *Transition and Curative Provisions.*

### § 55-17-03. Saving provisions.

(a) The existence of corporations formed before July 1, 1990, shall not be impaired by the enactment of this Chapter nor by any change made by this Chapter in the requirements for the formation of corporations nor by any amendment or repeal by this Chapter of the laws under which they were formed or created, and, except as otherwise expressly provided in this Chapter, the repeal of a prior act by this Chapter shall not affect any liability or penalty incurred, under the provisions of such act, prior to the repeal thereof.

(b) Any proceeding or corporate action commenced before July 1, 1990, may be completed in accordance with the law then in effect.

(c) A corporation dissolved by operation of law before July 1, 1990, may wind up and liquidate its business and affairs pursuant to the provisions of Article 14 of this Chapter. (1955, c. 1371, s. 1; 1957, c. 550, s. 1; 1973, c. 469, s. 1; 1989, c. 265, s. 1; 1993, c. 218, s. 1.)

**Effect of Amendments.** — The 1993 amendment, effective October 1, 1993, substituted "before" for "prior to" in subsection (b) and added subsection (c).

CASE NOTES

**Applied** in Barclays Leasing, Inc. v. National Bus. Sys., 750 F. Supp. 184 (W.D.N.C. 1990).

**Cited** in United States v. Vanguard Inv. Co., 6 F.3d 222 (4th Cir. 1993).

### § 55-17-05. Curative statute.

All deeds, conveyances and other instruments executed prior to the effective date of this Chapter and validated by the curative provisions of former G.S. 55-36.1 and former Article 12 of Chapter 55 as they were immediately prior to such effective date shall be valid and effective to the same extent as if those provisions had not been amended or repealed. The provisions of former G.S. 55-36 shall continue to apply to all instruments executed before July 1, 1990, to which that section applied. (1905, c. 316; Rev., s. 1248; 1939, c. 23; 1941, c. 294; 1943, c. 219, s. 1½; 1947, c. 504, ss. 1, 2; 1949, c. 436; c. 825; 1951, c. 395; C.S., s. 1134; G.S., ss. 55-35, 55-41, 55-41.1, 55-41.2, 55-42, 55-164.1, 55-164.2; 1955, c. 1371, s. 2; 1957, c. 500, s. 2; 1969, c. 953, s. 1; 1971, c. 60; 1977, c. 40, s. 1; 1979, c. 364; 1989, c. 265, s. 1; 1991, c. 647, s. 1.)

**Effect of Amendments.** — The 1991 amendment, effective July 1, 1990, but inapplicable to any action or proceeding filed on or after July 1, 1990, and before the ratification of the 1991 amendment [July 12, 1991], added the second sentence.

# TABLES OF COMPARABLE SECTIONS FOR CHAPTER 55

## Former to Present

**Editor's Note.** — The headings of the columns of the Former to Present Table appearing on page 330 of the main volume have been inadvertently reversed. The first, third and fifth columns on that page should read "Former Section" and the second, fourth and sixth columns should read "Present Section."

# Chapter 55A.

# North Carolina Nonprofit Corporation Act.

**Article 1.**

**General Provisions.**

Part 2. Filing Documents.

Sec.
55A-1-29. Penalty for signing false document.

Part 3. Secretary of State.

Sec.
55A-1-32. Penalties imposed upon corporations, officers, and directors for failure to answer interrogatories.

## ARTICLE 1.

## *General Provisions.*

### Part 2. Filing Documents.

### § 55A-1-29. Penalty for signing false document.

(a) A person commits an offense if the person signs a document the person knows is false in any material respect with intent that the document be delivered to the Secretary of State for filing.

(b) An offense under this section is a Class 1 misdemeanor. (1955, c. 1230; 1993, c. 398, s. 1; 1994, Ex. Sess., c. 14, s. 36.)

**Editor's Note.** — Session Laws 1994, Extra Session, c. 14, s. 73 provides: "Prosecutions for offenses committed before the effective date of this act [October 1, 1994] are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

**Effect of Amendments.** — The 1994 Extra Session amendment, effective on the same date that Chapter 539 of the 1993 Session Laws becomes effective (October 1, 1994), and applicable to offenses occurring on or after that date, inserted "Class 1" in subsection (b).

### Part 3. Secretary of State.

### § 55A-1-32. Penalties imposed upon corporations, officers, and directors for failure to answer interrogatories.

(a) The knowing failure or refusal of a domestic or foreign corporation to answer truthfully and fully, within the time prescribed in this Chapter, interrogatories propounded by the Secretary of State in accordance with the provisions of this Chapter shall constitute grounds for administrative dissolution under G.S. 55A-14-20 or for revocation under G.S. 55A-15-30, as the case may be.

(b) Each officer and director of a domestic or foreign corporation who knowingly fails or refuses, within the time prescribed by this Chapter, to answer truthfully and fully interrogatories propounded to him by the Secretary of State in accordance with the provisions of this Chapter shall be guilty of a Class 1 misdemeanor. (1955, c. 1230; 1993, c. 398, s. 1; 1994, Ex. Sess., c. 14, s. 37.)

**Editor's Note.** — Session Laws 1993, c. 539, s. 441 would have amended former § 55A-80, which dealt with similar subject matter, effective January 1, 1995, to designate the penalty for failure of corporations, directors or officers to answer interrogatories a Class 1 misdemeanor. However, Chapter 55A was rewritten by Session Laws 1993, c. 398, s. 1, effective July 1, 1994.

Session Laws 1994, Extra Session, c. 14, s. 73 provides: "Prosecutions for offenses committed before the effective date of this act [October 1, 1994] are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

**Effect of Amendments.** — The 1994 Extra Session amendment, effective on the same date that Chapter 539 of the 1993 Session Laws becomes effective (October 1, 1994), and applicable to offenses occurring on or after that date, inserted "Class 1" in subsection (b).

# Chapter 55B.

# Professional Corporation Act.

Sec.
55B-9. Professional relationship and liability.

## § 55B-9. Professional relationship and liability.

(a) Relationship. —Nothing in this Chapter shall be interpreted to abolish, modify, restrict, limit or alter the law in this State applicable to the professional relationship and liabilities between the licensee furnishing the professional services and the person receiving such professional service, or the standards of professional conduct applicable to the rendering therein of such services.

(b) Liability. — A shareholder, a director, or an officer of a professional corporation is not individually liable for the debts and obligations of the professional corporation arising from errors, omissions, negligence, incompetence, or malfeasance committed in the course of the professional corporation's business by another shareholder, director, or officer, or by a representative of the professional corporation not working under the supervision or direction of the first shareholder, director, or officer at the time the errors, omissions, negligence, incompetence, or malfeasance occurred, unless the first shareholder, director, or officer was directly involved in the specific activity in which the errors, omissions, negligence, incompetence, or malfeasance were committed by the other shareholder, director, or officer or by the representative. This subsection does not affect the joint and several liability of a shareholder, a director, or an officer of a professional corporation for any taxes owed by the professional corporation under Chapter 105 of the General Statutes or Article 3 of Chapter 119 of the General Statutes. (1969, c. 718, s. 9; 1993, c. 354, s. 2.)

**Editor's Note.** — Session Laws 1993, c. 354, s. 29 is a severability clause.

**Effect of Amendments.** — The 1993 amendment, effective October 1, 1993, added the subsection (a) catchline "Relationship"; in subsection (a), substituted "licensee" for "person" preceding "furnishing the professional services"; and added subsection (b).

# Chapter 57C.

# North Carolina Limited Liability Company Act.

**Article 1.**

**General Provisions.**

Part 2. Filing Documents.

Sec.
57C-1-29. Penalty for signing false document.

Part 3. Secretary of State.

Sec.
57C-1-32. Penalties imposed upon domestic and foreign limited liability companies for failure to answer interrogatories.

## ARTICLE 1.

## *General Provisions.*

### Part 2. Filing Documents.

### § 57C-1-29. Penalty for signing false document.

(a) A person commits an offense if the person signs a document the person knows is false in any material respect with intent that the document be delivered to the Secretary of State for filing.

(b) An offense under this section is a Class 1 misdemeanor. (1993, c. 354, s. 1; 1994, Ex. Sess., c. 14, s. 38.)

**Editor's Note.** — Session Laws 1994, Extra Session, c. 14, s. 73 provides: "Prosecutions for offenses committed before the effective date of this act [October 1, 1994] are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

**Effect of Amendments.** — The 1994 Extra Session amendment, effective on the same date that Chapter 539 of the 1993 Session Laws becomes effective (October 1, 1994), and applicable to offenses occurring on or after that date, inserted "Class 1" in subsection (b).

### Part 3. Secretary of State.

### § 57C-1-32. Penalties imposed upon domestic and foreign limited liability companies for failure to answer interrogatories.

(a) If a foreign or domestic limited liability company fails or refuses to answer truthfully and fully within the time prescribed in this Chapter interrogatories propounded by the Secretary of State in accordance with the provisions of this Chapter, the Secretary of State may suspend its articles of organization or its certificate of authority to do business in this State.

(b) Each manager of a foreign or domestic limited liability company who fails or refuses within the time prescribed by this Chapter to answer truthfully and fully interrogatories propounded to the manager by the Secretary of State in accordance with the provisions of this Chapter shall be guilty of a Class 1 misdemeanor. (1993, c. 354, s. 1; 1994, Ex. Sess., c. 14, s. 39.)

**Editor's Note.** — Session Laws 1994, Extra Session, c. 14, s. 73 provides: "Prosecutions for offenses committed before the effective date of this act [October 1, 1994] are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

**Effect of Amendments.** — The 1994 Extra Session amendment, effective on the same date that Chapter 539 of the 1993 Session Laws becomes effective (October 1, 1994), and applicable to offenses occurring on or after that date, inserted "Class 1" in subsection (b).

# STATE OF NORTH CAROLINA

## Department of Justice

Raleigh, North Carolina

*October 1, 1994*

I, Michael F. Easley, Attorney General of North Carolina, do hereby certify that the foregoing 1994 Cumulative Supplement to the General Statutes of North Carolina was prepared and published by The Michie Company under the supervision of the Department of Justice of the State of North Carolina.

Michael F. Easley
*Attorney General of North Carolina*

STATE OF NORTH CAROLINA

Department of Justice

Raleigh, North Carolina

*October 7, 1994*

I, Michael F. Easley, Attorney General of North Carolina, do hereby certify that the foregoing 1994 Cumulative Supplement to the General Statutes of North Carolina was prepared and published by The Michie Company under the supervision of the Department of Justice of the State of North Carolina.

Michael F. Easley

*Attorney General of North Carolina*